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TRANSCRIPT OF RECORD

Pat. 166 85796 W.D.S.C.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY,
PETITIONER,

vs.

G. NELSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 30, 1937.

CERTIORARI GRANTED OCTOBER 18, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY,
PETITIONER,

vs.

G. NELSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS:

REDMAN, ALEXANDER & BACON, Esqrs.,
R. P. WISECARVER, Esq.
333 Pine St., S. F. Calif.
Attorneys for Appellant.

HADSELL, SWEET, INGALLS & LAMB, Esqrs.,
Financial Center Bldg., S. F. Calif.
Attorneys for Appellee.

In the Superior Court of the State of California,
In and for the City and County of
San Francisco.

No. 19086-K

G. NELSON,

Plaintiff,

vs.

THE CENTURY INDEMNITY COMPANY, a corporation,

Defendant.

COMPLAINT OF UNDERTAKING ON RELEASE OF ATTACHMENT

COMES NOW the plaintiff above named and for cause of action against the defendant above named, alleges:

I.

That at all the times herein mentioned the defendant THE CENTURY INDEMNITY COMPANY was and now is a corporation organized and existing under the laws of the State of Con-

necticut and duly authorized and licensed to do a general surety business in the State of California.

II.

That on or about the 9th day of February, 1929, one V. BERGES, filed an action, in the above entitled court against SAN FRANCISCO IRON & METAL COMPANY, a corporation, and L. SILBERMAN, said action being numbered 204668; that thereupon in said action a writ of attachment was issued and levied against the property, credits and effects of the defendants SAN FRANCISCO IRON & METAL COMPANY, a corporation, and L. SILBERMAN, as security for the satisfaction of any judgment that might be recovered by plaintiff V. Berges, and certain property, credits and effects of each of said defendants in excess of the value of $6,000.00 were attached and seized by the Sheriff of the City [1*] County of San Francisco pursuant to said Writ of Attachment.

III.

That thereafter, on or about the 14th day of February, 1929, the defendant THE CENTURY INDEMNITY COMPANY made, executed and delivered its undertaking on release of the attachment herein mentioned, as follows:

[1*] Page numbering appearing at the foot of page of original certified Transcript of Record.

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

V. BERGES,

Plaintiff,

vs.

SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN,

Defendants.

UNDERTAKING ON RELEASE OF ATTACHMENT

WHEREAS, the above named Plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above named Defendants claiming that there was due to said Plaintiff from said Defendants the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, or thereabouts, and thereupon an attachment issued against the property credits and effects of Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, as security for the satisfaction of any judgment that might be recovered therein; and certain property credits and effects of the said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SIL-

VERMAN and L. SILVERMAN, have been attached and seized by the Sheriff of the said City and County, under and by virtue of the said writ;

AND WHEREAS, the said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, are desirous of having said property credits and effects released from said attachment,

NOW, THEREFORE, the undersigned, THE CENTURY INDEMNITY COMPANY, Hartford, Connecticut, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized and licensed to do a general surety business in the State of California, in considera[2]tion of the premises, and also in consideration of the release from said attachment of the property credits and effects attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6,000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, redeliver the attached property

credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, pay to the Plaintiff the full value of the property credits and effects released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the corporate seal and name of the said Surety Company is hereto affixed at San Francisco, California, by its duly authorized Attorney-in-Fact, this 14th day of February, A. D. 1929.

THE CENTURY INDEMNITY COMPANY
By F. J. CRISP
Attorney in Fact
F. J. Crisp" (Seal)

IV.

That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, et al.,

Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between plaintiff, defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr. and L. Silberman and the Century Indemnity Company, as follows: [3]

1.—That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman."

2.—That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6,000.00 each.

3.—That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said former bond is hereby declared to be null and

void and without effect.

Dated: February 14, 1929.

ROBERT E. HATCH
Attorney for Plaintiff.

LOUIS E. GOODMAN
Attorney for Defendants.

THE CENTURY INDEMNITY COMPANY,
By F. J. Crisp
Attorney in Fact."

V.

That upon the issuance of said undertaking of defendant herein and the execution of the stipulation hereinbefore referred to and in consideration thereof, the Sheriff of the City and County of San Francisco released said attached property and/or credits and/or effects of said defendants and returned the same to the said defendants.

VI.

That thereafter, on or about the 10th day of October, 1929, judgment was rendered for the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with legal interest thereon and costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars against SAN FRANCISCO IRON & METAL COMPANY, a corporation, and the defendant L. SILBERMAN in favor of the plaintiff V. BERGES in said action numbered 204,668; that said judgment has not been re-

versed or modified and has become final and is wholly unpaid and unsatisfied. [4]

VII.

That on or about the 21st day of February, 1930, the plaintiff, V. BERGES, sold, assigned and transferred to the plaintiff herein, G. NELSON, the said judgment in favor of plaintiff, V. BERGES, against SAN FRANCISCO IRON & METAL COMPANY, a corporation, and L. SILBERMAN, in the amount of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with Sixty-nine and 90/100 ($69.90) Dollars costs and with interest thereon at the rate of seven per cent (7%) per annum, for the full use and benefit of the plaintiff herein G. NELSON; that there is now due, owing and unpaid to plaintiff herein said sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars and interest thereon at the rate of seven per cent (7%) from the date of said judgment, although demand has been made for the payment thereof prior to the commencement of this action; that said judgment is recorded in Judgment Book 305 at page 67, in the Office of the Clerk of the above entitled court.

VIII.

That after the judgment in said action #20466 became final in favor of V. Berges and prior to the commencement of this action, a Writ of Execution

against defendant L. Silberman was issued to the Sheriff of the County of Los Angeles, State of California, where L. Silberman then resided, and said execution was returned by the said Sheriff wholly unsatisfied; that the San Francisco Iron & Metal Company, a corporation is insolvent and bankrupt and bankruptcy proceedings are now pending; that prior to the commencement of this action, claim was duly filed in said bankruptcy proceedings in behalf of plaintiff herein for payment of said judgment hereinbefore referred to, but plaintiff is informed and believes [5] and therefore alleges that there are no assets of said bankrupt to pay said judgment; that plaintiff is informed and believes and therefore alleges upon such information and belief that the defendant L. Silberman is also insolvent; that prior to the commencement of this action and after said judgment herein referred to became final, demand was duly made upon the defendant herein that the attached property, credits and effects hereinbefore referred to be applied to the payment of said judgment or in default thereof that payment be made in accordance with the undertaking on release of attachment furnished by the defendant herein.

IX.

That the attachment hereinbefore mentioned against said defendants was not dissolved or modified prior to the issuance of the undertaking on release of attachment and said attachment was at

all the times herein mentioned and now is in full force and effect, save and except that the attached property and/or credits and/or effects was released to said defendants by the Sheriff of the City and County of San Francisco upon and in consideration of the undertaking hereinbefore referred to.

X.

That the undertaking on release of attachment hereinbefore referred to in Paragraph III was furnished in action No. 204668 and the persons named in said bond as "H. Silverman and L. Silverman" were and are the same persons as referred to and mentioned in Paragraph IV herein as "H. Silberman and L. Silberman"; that during the course of the trial of said action No. 204668 by V. Berges, the pleadings were amended so as to change the names "H. SILVERMAN and L. SILVERMAN" to "H. SILBERMAN and L. SILBERMAN" upon order of the above entitled court.

WHEREFORE, plaintiff prays judgment for the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) [6] Dollars principal, Sixty-nine and 90/100 ($69.90) Dollars Costs, together with interest thereon at the rate of seven percent (7%) from the date of said judgment, for costs of this suit and for such other and further relief as may be meet and proper in the premises.

HADSELL, SWEET & INGALLS

Attorneys for plaintiff. [7]

State of California,
City and County of San Francisco—ss.

G. NELSON, being first duly sworn, deposes and says:—

That she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to matters therein stated upon information or belief and as to those matters that she believes it to be true.

G. NELSON

Subscribed and sworn to before me this 24 day of September, 1931.

[Seal] KATHRYN E. STONE
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Superior Court Sep 24 1931
[Endorsed] Filed U. S. Dist. Court Nov 5 1931[8]

In the District Court of the United States for the Northern District of California
Southern Division
No. 19086 K

G. NELSON,
Plaintiff,
vs.
THE CENTURY INDEMNITY COMPANY, a corporation,
Defendant.

ANSWER TO COMPLAINT

Comes now the defendant, and answering the complaint denies and alleges as follows:

1. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph II of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

2. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph III of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained, excepting that defendant admits that it signed an alleged undertaking as therein stated.

3. Referring to paragraph IV of the complaint, defendant admits that it signed a document therein referred to, but has no information or belief upon the subject sufficient to enable it to answer whether it was signed or executed or delivered by any of the other parties thereto, and therefore and upon that ground denies said allegations. [9]

4. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph V of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

5. Referring to paragraph VI of the complaint defendant denies that the judgment as rendered was against only the persons named in said paragraph VI, and alleges the true fact to be that said judgment was also against another defendant in said action, for whom a release of attachment undertaking had been issued by Fidelity & Casualty Company of New York; denies that said judgment is wholly unpaid and unsatisfied or wholly or at all unpaid or unsatisfied, and alleges that the judgment has been fully paid and satisfied.

6. Defendant denies generally and specifically all and singular each and every allegation contained in paragraph VII of the complaint, and in that behalf alleges the fact to be that the alleged judgment in favor of V. Berges has been fully paid and satisfied, and denies that there is now due and owing and unpaid, or due or owing or unpaid to plaintiff or to any person the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, or any sum, and/or costs in the sum of Sixty-nine and 90/100 ($69.90) Dollars, or any sum, and/or with interest or otherwise, or any sum or amount; and denies that there is any amount due or owing or unpaid to the plaintiff herein. [10]

7. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph VIII of the complaint, and therefore and upon that ground denies each and every allegation in said

paragraph contained; and denies that demand was made upon the defendant herein that the attached property and/or credits and/or effects referred to or at all be applied to the payment of the alleged judgment.

8. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph IX of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

9. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph X of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

10. Further answering said complaint, and as a separate defense thereto defendant alleges that the Fidelity & Casualty Company of New York, a corporation, executed an undertaking for release of attachment in the proceeding referred to in the complaint herein, on behalf of one of the defendants in said action; thereafter, following judgment against the defendants in said action and pursuant to the terms of said undertaking for release of attachment, said Fidelity & Casualty Company caused to be paid to the plaintiff in said action the full amount of the judgment therein, and paid in full the judgment in said action against the defendants therein, and all of them. [11]

11. Further answering said complaint, and as a separate defense thereto, defendant alleges that the claim sued upon in the above entitled action was fully paid, satisfied and discharged prior to the commencement of this action.

12. Further answering said complaint, and as a separate defense thereto defendant alleges that the above entitled action has not been prosecuted in the name of the real party in interest, and that the plaintiff in said action is not the real party in interest.

13. Further answering said complaint, and as a separate defense thereto, defendant alleges that in action No. 204,668 referred to in paragraph II of the complaint in the above entitled action, the Fidelity & Casualty Company of New York issued an undertaking releasing an attachment in said action, and thereafter following a joint judgment against the defendants in said action said Fidelity & Casualty Company, pursuant to said undertaking, fully paid the judgment in said action, and said Fidelity & Casualty Company is attempting in this suit to recover from another surety for the payment of the obligation of said Fidelity & Casualty Company by virtue of its undertaking.

14. Further answering said complaint and as a separate defense thereto defendant alleges that prior to the commencement of this action plaintiff's assignor prejudiced the rights of the defendant herein, and in that behalf alleges upon information

and belief that plaintiff's assignor had a right of action against the Fidelity & Casualty Company upon a release of attachment undertaking issued as above stated, and that said plaintiff's assignor released said Fidelity & Casualty Company from all obligation on said undertaking, and thereby prejudiced and destroyed this defendant's right to subrogation and [12] indemnity and exoneration, and thereby said defendant was released and discharged from all further obligation to plaintiff's assignor and to plaintiff.

15. Further answering said complaint and as a separate defense thereto defendant alleges that it has been released from liability upon the alleged undertaking by reason of an agreement between plaintiff's assignor and the Fidelity & Casualty Company, which said agreement was in effect that no claim should be made against the Fidelity & Casualty Company upon the undertaking which it had executed to release the attachment in the aforesaid action, thereby prejudicing and impairing the rights of defendant herein.

16. Further answering said complaint, and as a separate defense thereto defendant alleges that the judgment in action No. 204,668, referred to in paragraph II of the complaint, was paid by the Fidelity & Casualty Company as surety upon an undertaking in said action releasing an attachment, and defendant alleges that said Fidelity & Casualty Company did not within ten days after said pay-

ment file with the Clerk of the Court where the judgment was rendered notice of such payment or claim to contribution or repayment as required by Section 709 of the Code of Civil Procedure of the State of California; that plaintiff in the above entitled action is acting for and on behalf of the Fidelity & Casualty Company, and not on plaintiff's own behalf.

17. Further answering said complaint, and as a separate defense thereto defendant alleges that the Fidelity & Casualty Company as surety executed an undertaking releasing an attachment in action No. 204,668 referred to in paragraph II of the complaint in the above entitled action, and by reason of the execution of said undertaking said Fidelity & Casualty Company [13] was obliged to pay and thereafter did pay the judgment rendered in said action; that by reason of collusion between plaintiff herein and Fidelity & Casualty Company and other parties an effort is here being made to transfer the obligation of said Fidelity & Casualty Company to the defendant herein, and by means of said collusion attempt to recover from the defendant herein for the obligation which was paid by the Fidelity & Casualty Company.

18. Further answering said complaint and as a separate defense thereto, defendant alleges that if it were obliged to pay the judgment in the above entitled action such payment would be to the plain-

tiff in the above entitled action for the benefit of Fidelity & Casualty Company, and not otherwise; and that said Fidelity & Casualty Company by reason of the execution of an undertaking to release attachment in the action referred to in paragraph II of the complaint, was obligated to pay and did pay said judgment, when it became final against the defendant in said action for whom it had executed said undertaking, and the defendant in this action has been released thereby from any further obligation to the plaintiff's assignor or to the plaintiff.

WHEREFORE, defendant prays to be hence dismissed with its costs.

REDMAN, ALEXANDER & BACON
Attorneys for Defendant [14]

State of California,
City and County of San Francisco—ss.

HOWARD WHITE, being first duly sworn, deposes and says: That he is the Manager of the Claim Division of the Century Indemnity Company, defendant in the above entitled action, and as such is authorized to verify the answer of said defendant; that he has read the foregoing answer to the complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information or

belief, and that as to such matters he believes it to be true.

HOWARD WHITE

Subscribed and sworn to before me this 30 day of Dec., 1931

[Seal] ETTA LAIDLAW

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Service of the within answer admitted this 31st day of December 1931.

HADSELL, SWEET, INGALLS

Attorney for Plaintiff

[Endorsed]: Filed Dec 31 1931 [15]

[Title of Court and Cause.]

WAIVER OF JURY

To the Above Entitled Court and to the Clerk Thereof and to Defendant the Century Indemnity Company and Messrs. Redman, Alexander & Bacon, its Attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the plaintiff herein waives a trial by jury in the above entitled cause and requests that the same be submitted to the court without the intervention of a jury.

Dated: February 4, 1932.

HADSELL SWEET & INGALLS

Attorneys for Plaintiff

[Endorsed] Service and receipt of a copy of the within Waiver of Jury is hereby admitted this 5th day of February 1932.

REDMAN, ALEXANDER & BACON
Attorney for defendant.

[Endorsed]: Filed Feb 5, 1932. [16]

[Title of Court and Cause.]

WAIVER OF TRIAL BY JURY

Defendant hereby waives trial by jury in the above entitled cause.

Dated: February 24th 1932.

REDMAN, ALEXANDER & BACON
Attorneys for Defendant.

[Endorsed]: Filed Feb 25 1932. [17]

District Court of the United States,
Northern District of California,
Southern Division

AS A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 31st day of May, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

[Title of Cause.]

This case having been heretofore heard and submitted and due consideration having been had, it is Ordered that Judgment be entered for plaintiff, with interest and costs, upon Findings of Facts and Conclusions of Law, to be presented. [18]

[Title of Court and Cause.]

Defendant, Century Indemnity Company herewith submits its proposed special findings of fact and conclusions of law in lieu of those proposed by plaintiff.

REDMAN, ALEXANDER & BACON
R. P. WISECARVER
Attorneys for defendant.

Received copy of the within proposed special findings and conclusions of law this 11th day of June, 1934.

HADSELL, SWEET, INGALLS & LAMB
Attorneys for Plaintiff [19]

[Title of Court and Cause.]

PROPOSED SPECIAL FINDINGS AND CONCLUSIONS OF LAW

I.

That at all the times herein mentioned the defendant The Century Indemnity Company was and now is a corporation organized and existing under the

laws of the State of Connecticut and duly authorized and licensed to do a general surety business in the State of California; and at all times herein mentioned the Fidelity and Casualty Company of New York was a corporation organized and existing under the laws of the State of New York and duly authorized and licensed to do a general surety business in the State of California.

II.

That on or about the 9th day of February, 1929, one V. Berges filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against N. Abraham, San Francisco Iron & Metal Company, a corporation, L. Silberman and H. Silberman, said action being numbered 204668 therein; that thereupon in said action a writ of attachment was issued and levied against the property, credits and effects of the defendants San Francisco Iron & Metal Company, a corporation, [20] H. Silberman and L. Silberman, as security for the satisfaction of any judgment that might be recovered by plaintiff V. Berges, and certain property, credits and effects of each of said defendants of the value of $6,000.00 for each of said defendants were attached and seized by the Sheriff of the said City and County of San Francisco pursuant to said writ of attachment.

III.

That thereafter, on or about the 14th day of February, 1929, the defendant The Century Indemnity Company made, executed and delivered its undertaking on release of the attachment herein mentioned, as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco

V. BERGES,

Plaintiff

vs.

SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN,

Defendants

UNDERTAKING ON RELEASE OF ATTACHMENT

WHEREAS, the above named Plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above named Defendants claiming that there was due to said Plaintiff from said Defendants the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, or thereabouts, and thereupon an attachment issued against the prop-

erty, credits and effects of Defendants SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, as security for the satisfaction of any judgment that might be recovered therein; and certain property credits and effects of the said Defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, have been attached and seized by the Sheriff of the said City and County, under and by virtue of the said writ;

AND WHEREAS, the said Defendants San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, are desirous of having said property credits and effects released from said attachment, [21]

NOW THEREFORE, the undersigned, The Century Indemnity Hartford, Connecticut, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized and licensed to do a general surety business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment of the property credits and effects attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6,000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against Defendants, San Francisco Iron & Metal Com-

pany, a corporation, H. Silverman and L. Silverman, said Defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, will, on demand, redeliver the attached property credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, will, on demand, pay to the Plaintiff the full value of the property credits and effects released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the corporate seal and name of the said surety company is hereto affixed at San Francisco, California, by its duly authorized Attorney in Fact, this 14th day of February, A. D. 1929.

THE CENTURY INDEMNITY COMPANY
By F. J. CRISP
Attorney in Fact
F. J. Crisp" [Seal]

IV.

That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, et al.,

Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between plaintiff, [22] defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr. and L. Silberman and the Century Indemnity Company, as follows:

1. That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman."

2. That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6,000.00 each.

3. That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said

former bond is hereby declared to be null and void and without effect.

Dated: February 14, 1929.

ROBERT E. HATCH,
Attorney for Plaintiff
LOUIS E. GOODMAN
Attorney for Defendants
THE CENTURY INDEMNITY COMPANY
By F. J. Crisp
Attorney-in Fact."

V.

That upon the issuance of said undertaking of defendant herein and the execution of the stipulation hereinbefore referred to and in consideration thereof, the Sheriff of said City and County of San Francisco released said attached property and/or credits and/or effects of said defendants and returned the same to the said defendants.

VI.

'That thereafter, on or about the 10th day of October, 1929, a joint and several judgment was rendered for the sum of Five Thousand, Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with interest of seven per cent. (7%) thereon and costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars against San Francisco Iron & Metal Company, a corporation, and the defend-

ants L. Silberman and N. Abraham in favor of the plaintiff [23] V. Berges in said action numbered 204,668; that said judgment has not been reversed or modified and has become final, and is in terms and figures as follows:

"This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the Court made and filed its findings of fact and conclusions of law. Pursuant thereto, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $69.90.

(2) That defendants take nothing by reason of their counter claim and cross-complaint.

Dated: October 10, 1929."

VII.

That on or about the 21st day of February, 1930, the plaintiff V. Berges for the sum of Five Thousand Eight Hundred Twenty-seven and 96/100 Dol-

lars ($5,827.96) sold, assigned and transferred to the plaintiff herein, G. Nelson, the said judgment for the full use and benefit of the plaintiff herein G. Nelson in trust for the Fidelity & Casualty Company of New York; that plaintiff ever since has been and is now the holder of said judgment in trust for the Fidelity and Casualty Company of New York; that said judgment is recorded in Judgment Book 305 at page 67 in the Office of the Clerk of said Superior Court of the State of California, in and for the City and County of San Francisco, and remains fully unsatisfied.

VIII.

That after the judgment in said action #204668 became final in favor of V. Berges and prior to the commencement of this action, a writ of execution against defendant L. Silberman was [24] issued to the Sheriff of the County of Los Angeles, State of California, where L. Silberman then resided, and said execution was returned by the said Sheriff wholly unsatisfied; that prior to the commencement of this action the San Francisco Iron & Metal Company, a corporation, became bankrupt and bankruptcy proceedings are now pending in the United States District Court in and for the Northern District of California; that prior to the commencement of this action, claim was duly filed in said bankruptcy proceedings by plaintiff herein for payment of said judgment hereinbefore referred

to, but neither said claim nor any part thereof has been paid.

IX.

That the undertaking on release of attachment hereinbefore referred to in Paragraph III was furnished in action No. 204668 and the persons named in said bond as "H. Silverman and L. Silverman" were and are the same persons as referred to and mentioned in paragraph IV herein as "H. Silberman and L. Silberman"; that during the course of the trial of said action No. 204668 by V. Berges, the pleadings were amended so as to change the names "H. Silverman and L. Silverman" to "H. Silberman and L. Silberman" upon order of the above entitled court.

X.

That when V. Berges assigned said judgment to the plaintiff G. Nelson as found in paragraph VII hereof, said V. Berges also delivered to said G. Nelson said bond or undertaking set forth in paragraph III hereof, and G. Nelson ever since has been and now is the holder thereof in trust for the Fidelity and Casualty Company of New York.

XI.

That on or about the 26th day of February, 1929, the [25] Fidelity and Casualty Company of New York on behalf solely of another defendant N. Abra-

ham in said action mentioned in paragraph II of these findings issued and delivered to said plaintiff V. Berges a bond on release of attachment in similar terms to the bond or undertaking on release of attachment mentioned in paragraph III of these findings, and that said bond related solely to the property, credits, and effects of said defendant N. Abraham and related solely to the recovery of judgment in said action against said defendant N. Abraham; that thereupon plaintiff in said action in consideration of the execution and delivery of said bond or undertaking to the plaintiff directed the sheriff to release, and the sheriff did release the attachment theretofore levied in said action against the property, credits, and effects of said defendant N. Abraham; that when the plaintiff V. Berges assigned said judgment to said G. Nelson as found in paragraph VII of these findings, said V. Berges also delivered to said G. Nelson said bond or undertaking on release of attachment executed as aforesaid by said Fidelity and Casualty Company of New York, and thereafter said G. Nelson delivered said bond or undertaking to said Fidelity and Casualty Company of New York. That the said payment made by G. Nelson to V. Berges as set forth in finding No. VII herein was made by the Fidelity and Casualty Company of New York by and through G. Nelson and was pursuant to and in fulfillment of its obligation so to do under its said bond and undertaking for release of at-

tachment issued for N. Abraham, one of the judgment debtors in the judgment in the case of Berges vs. Abraham, et al., as set forth in finding VI herein.

XII.

That the said Fidelity and Casualty Company of New York is the real party in interest herein, and the plaintiff herein rep[26]resents only the interests of the said Fidelity and Casualty Company of New York and is entitled to recover the amounts only which the Fidelity and Casualty Company of New York could and should recover by way of contribution or reimbursement, and no more. That the defendant was the surety of San Francisco Iron and Metal Company, a corporation, and L. Silberman, who were joint debtors and joint adventurers with N. Abraham and who were held jointly and severally liable with N. Abraham for the judgment rendered in the case of V. Berges vs. N. Abraham, et al. as found in finding No. VI herein; that the Fidelity and Casualty Company of New York was the surety of said N. Abraham, one of the joint debtors in the said judgment rendered in Berges vs. N. Abraham, et al. as found in finding No. VI herein.

XIII.

That the Century Indemnity Company and the Fidelity and Casualty Company of New York are

not sureties of the same principal nor for the same obligation, and neither L. Silberman, San Francisco Iron and Metal Company nor Century Indemnity Company were a principal under the bond and undertaking of Fidelity and Casualty Company of New York referred to in finding XI herein.

XIV.

That the debt which formed the subject matter of the judgment in the action of Berges vs. Abraham, et al. as found in paragraph IV was incurred by N. Abraham for and on behalf of N. Abraham Mercantile Company, a trade name under which the said N. Abraham carried on business prior to November 1, 1926. That the San Francisco Iron & Metal Company was a co-partner with the said N. Abraham from and after November 1, 1926 and did business as such joint adventurers and partners under the said name of N. Abraham Mercantile Company from November 1, 1926 to December 1, [27] 1927, at which time said partnership and joint adventure was dissolved. That it was agreed between said partners that the San Francisco Iron and Metal Company would pay the debts contracted on behalf of the partnership but it was not agreed that the San Francisco Iron and Metal Company would pay any of the antecedent debts of N. Abraham contracted prior to November 1, 1926; that the debt which formed the subject matter of the judgment sued on herein was a personal

debt of N. Abraham contracted prior to November 1, 1926 and that it is not true that the San Francisco Iron and Metal Company agreed to save harmless N. Abraham of and from his obligation to pay said antecedent debt. That finding IVa of the findings of fact in said action of Berges vs. Abraham, et al., to the effect that the said San Francisco Iron and Metal Company agreed to pay the said debt which formed the subject matter of said action was not an issue between the plaintiff and the defendants in said action, and the judgment in said action as found in finding VI herein is not in accord with said finding and is contrary to said finding.

CONCLUSIONS OF LAW

1. That plaintiff may recover under the assignment of the judgment as pleaded only to the extent that the Fidelity and Casualty Company of New York could recover and that as to all amounts over and above such recovery the said judgment must be deemed to be satisfied by the payment made by the said Fidelity and Casualty Company.

2. That there was and is no co-suretyship existing between the defendant Century Indemnity Company and the Fidelity and Casualty Company of New York, and that the plaintiff herein is not entitled to recover for and on behalf of the said Fidelity and [28] Casualty Company of New York by way of reimbursement or contribution from the

defendant; that plaintiff cannot recover from defendant under the assignment of the judgment in Berges vs. Abraham, et al. except by way of contribution or reimbursement.

3. That the judgment in Berges vs. Abraham, et al. is res adjudicata between the defendants therein only as joint debtors and that contribution under said judgment exists between said joint debtors ratable and in equal proportions; that L. Silberman is insolvent and plaintiff, on behalf of Fidelity and Casualty Company of New York and of its principal, N. Abraham, is entitled to a judgment against San Francisco Iron and Metal Company in amount of 50% of the payment made on said judgment with interest from said date, that is, in the amount of $2913.98, with interest at seven per cent. (7%) from February 21, 1930.

4. That plaintiff is not entitled to contribution or reimbursement from defendant and that defendant is entitled to judgment against plaintiff for its costs.

Judge of the United States District Court.

[Endorsed]: Lodged June 11, 1934 [29]

[Title of Court and Cause.]

SPECIAL FINDINGS AND CONCLUSIONS OF LAW

That at all times herein mentioned the defendant

THE CENTURY INDEMNITY COMPANY was and now is a corporation organized and existing under the laws of the State of Connecticut and duly authorized and licensed to do a general surety business in the State of California.

II.

That on or about the 9th day of February, 1929, one V. BERGES, filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against SAN FRANCISCO IRON & METAL COMPANY, a corporation, L. SILBERMAN, H. SILBERMAN, and N. ABRAHAM, said action being numbered 204668 therein; that thereupon in said action a writ of attachment was issued and levied against the property, credits and effects of the defendants SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILBERMAN, and L. SILBERMAN, as security for the satisfaction of any judgment that might be recovered by plaintiff V. BERGES, and certain property, credits and effects of each of said defendants in excess of the value of $6,000.00 for each of said defendants were attached and seized by the Sheriff of the said City and County of San Francisco pursuant to said Writ of Attachment.

III.

That thereafter, on or about the 14th day of

February, 1929, the defendant THE CENTURY INDEMNITY COMPANY made, executed and delivered its undertaking on release of the attachment herein mentioned, as follows: [30]

"In the Superior Court of the State of California in and for the City and County of San Francisco

V. Berges,

Plaintiff,

-vs-

SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN,

Defendants.

UNDERTAKING ON RELEASE OF ATTACHMENT

WHEREAS, the above named Plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above named Defendants claiming that there was due to said Plaintiff from said Defendants the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, or thereabouts, and thereupon an attachment issued against the property, credits and effects of Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, as security for the satisfaction of

any judgment that might be recovered therein; and certain property credits and effects of the said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, have been attached and seized by the Sheriff of the said City and County, under and by virtue of the said writ:

AND WHEREAS, the said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, are desirous of having said property credits and effects released from said attachment,

NOW THEREFORE, the undersigned, THE CENTURY INDEMNITY COMPANY, Hartford, Connecticut, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized and licensed to do a general surety business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment of the property credits and effects attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6,000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, said

Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, redeliver the attached property credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, pay to the Plaintiff the full value of the property [31] credits and effects released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the corporate seal and name of the said Surety Company is hereto affixed at San Francisco, California, by its duly authorized Attorney in Fact, this 14th day of February, A. D. 1929.

THE CENTURY INDEMNITY COMPANY

[Seal] By F. J. CRISP
Attorney in Fact
F. J. Crisp"

IV.

That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

-vs-

N. ABRAHAM, et al.,

Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between plaintiff, defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr., and L. Silberman and the Century Indemnity Company, as follows:

1. That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman."

2. That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6,000.00 each.

3. That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said

former bond is hereby declared to be null and void and without effect.

Dated: February 14, 1929.

ROBERT E. HATCH,
Attorney for Plaintiff
LOUIS E. GOODMAN
Attorney for Defendants
THE CENTURY INDEMNITY COMPANY,
By—F. J. Crisp
Attorney in Fact." [32]

V.

That upon the issuance of said undertaking of defendant herein and the execution of the stipulation hereinbefore referred to and in consideration thereof, the Sheriff of said City and County of San Francisco released said attached property and/or credits and/or effects of said defendants and returned the same to the said defendants.

VI.

That thereafter, on or about the 10th day of October, 1929, judgment was rendered for the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with legal interest thereon and costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars against SAN FRANCISCO IRON & METAL COMPANY, a corporation, and the defendants L. SILBERMAN

and N. ABRAHAM in favor of the plaintiff V. BERGES in said action numbered 204,668; that said judgment has not been reversed or modified and has become final and is wholly unpaid and unsatisfied.

VII.

That on or about the 21st day of February, 1930, the plaintiff V. BERGES for the sum of Five Thousand Eight Hundred Twenty-seven and 96/100 Dollars ($5,827.96) sold, assigned and transferred to the plaintiff herein, G. NELSON, the said judgment for the full use and benefit of the plaintiff herein G. NELSON in trust for the Fidelity & Casualty Company of New York; that plaintiff is now the legal owner and holder of said judgment; that there is now due, owing and unpaid to plaintiff herein said sum of Five Thousand Six Hundred Forty-three and 65/100 Dollars ($5,643.65), together with costs in the amount of Sixty-nine and 90/100 Dollars ($69.90) and interest thereon at the rate of seven per cent (7%) from the date of said judgment; that said judgment is recorded in Judgment [33] Book 305 at page 67 in the Office of the Clerk of said Superior Court of the State of California, in and for the City and County of San Francisco, and remains fully unsatisfied.

VIII.

That after the judgment in said action #204668

became final in favor of V. Berges and prior to the commencement of this action, a Writ of Execution against defendant L. Silberman was issued to the Sheriff of the County of Los Angeles, State of California, where L. Silberman then resided, and said execution was returned by the said Sheriff wholly unsatisfied; that prior to the commencement of this action the San Francisco Iron & Metal Company, a corporation, became bankrupt and bankruptcy proceedings are now pending in the United States District Court in and for the Northern District of California; that prior to the commencement of this action, claim was duly filed in said bankruptcy proceedings by plaintiff herein for payment of said judgment hereinbefore referred to, but neither said claim nor any part thereof has been paid.

IX.

That the attachment hereinbefore mentioned against said defendants was not dissolved or modified prior to the issuance of said undertaking on release of attachment and said attachment was at all the times herein mentioned and now is in full force and effect, save and except that the attached property and/or credits and/or effects were released to said defendants by said Sheriff of the City and County of San Francisco upon and in consideration of the undertaking hereinbefore referred to.

X.

That the undertaking on release of attachment herein- [34] before referred to in Paragraph III was furnished in action No. 204668 and the persons named in said bond as "H. Silverman and L. Silverman" were and are the same persons as referred to and mentioned in Paragraph IV herein as "H. Silberman and L. Silberman"; that during the course of the trial of said action No. 204668 by V. Berges, the pleadings were amended so as to change the names "H. SILVERMAN and L. SILVERMAN" to "H. SILBERMAN and L. SILBERMAN" upon order of the above entitled court.

XI.

That when V. BERGES assigned said judgment to the plaintiff G. NELSON as found in paragraph VII hereof, said V. BERGES also delivered to said G. NELSON said bond of undertaking set forth in paragraph III hereof, and G. NELSON ever since has been and now is the owner and holder thereof in trust for the Fidelity and Casualty Company of New York.

XII.

That in said action entitled V. BERGES vs. SAN FRANCISCO IRON AND METAL COMPANY which is mentioned in paragraph II of

these Findings, the plaintiff alleged by amendment to her complaint, and the defendants H. Silberman, L. Silberman and San Francisco Iron & Metal Company, a corporation, in answer to said amendment to the complaint denied, as follows:

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, H. Silberman, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. Abraham Mercantile Company; that about October, 1927, defendant San Francisco Iron & Metal Company received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the payment of the claim and matters herein sued for, but that said def- [35] endant San Francisco Iron & Metal Company has wholly failed to do."

XIII.

That thereafter the court in said action after the trial thereof made and entered its Findings of Fact:

"That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company; that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considerations specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

XIV.

That the terms of said Judgment so rendered in said action are as follows:

"This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the Court made and filed its findings of fact and conclusions of law. Pursuant thereto, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $69.90. [36]

(2) That defendants take nothing by reason of their counter claim and cross-complaint.

Dated: October 10, 1929."

XV.

That on or about the 26th day of February, 1929, the Fidelity and Casualty Company of New York on behalf solely of another defendant N. Abraham in said action mentioned in paragraph II of these

Findings issued and delivered to said plaintiff V. Berges a bond on release of attachment in similar terms to the bond or undertaking on release of attachment mentioned in paragraph III of these Findings, and that said bond related solely to the property, credits, and effects of said defendant N. Abraham and related solely to the recovery of judgment in said action against said defendant N. Abraham; that thereupon plaintiff in said action in consideration of the execution and delivery of said bond or undertaking to the plaintiff directed the sheriff to release, and the sheriff did release the attachment theretofore levied in said action against the property, credits, and effects of said defendant N. Abraham; that when the plaintiff V. Berges assigned said judgment to said G. Nelson as found in paragraph VII of these Findings, said V. Berges also delivered to said G. Nelson said bond or undertaking on release of attachment executed as aforesaid by said Fidelity and Casualty Company of New York, and thereafter said G. Nelson delivered said bond or undertaking to said Fidelity and Casualty Company of New York.

XVI.

That on the trial of this action plaintiff herein has tendered to the defendant and has delivered to the Clerk of this court for the benefit of the defendant for delivery to defendant upon payment of any judgment herein rendered in plaintiff's favor against defendant an assignment by plain-

tiff to defendant of the claim of the plaintiff against the San [37] Francisco Iron & Metal Company, a corporation, in bankruptcy.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the court concludes that judgment should be entered in favor of the plaintiff and against the defendant in the sum of Six Thousand ($6000.00) Dollars together with interest thereon at the legal rate of seven per cent (7%) per annum from the date of the commencement of this action, to-wit: September 24, 1931, together with plaintiff's costs of suit incurred herein, and that upon satisfaction of said Judgment the Clerk of this court should deliver to the defendant the assignment by plaintiff to defendant of claim of plaintiff against the San Francisco Iron & Metal Company, a corporation in bankruptcy.

Let judgment be entered accordingly.

Dated: June 16th, 1934.

FRANK H. KERRIGAN
United States District Judge.

[Endorsed]: Receipt of a copy of the within SPECIAL FINDINGS AND CONCLUSIONS OF LAW is hereby admitted this 6th day of June 1934.

R. P. WISECARVER
REDMAN, ALEXANDER & BACON
Attorneys for Defendant.

[Endorsed]: Filed Jun 16 1934 [38]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19086-K

G. NELSON,

Plaintiff,

-vs-

THE CENTURY INDEMNITY COMPANY,

Defendant.

JUDGMENT ON FINDINGS

This cause came on regularly for trial upon the 16th day of May, 1934, before the Court sitting without a Jury, a trial by Jury having been waived by written stipulation filed; Don Hadsell, Esq., appearing as attorney for plaintiff, and R. P. Wisecarver, Esq., appearing as attorney for defendant, and the trial having been proceeded with on the 21st day of May, 1934, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings, and ordered that judgment be entered in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the Findings aforesaid, it is adjudged by the Court that G. Nelson, Plaintiff, do have and

recover of and from said The Century Indemnity Company, Defendant, the sum of Six Thousand (6,000.00) Dollars, together with interest thereon at the legal rate of seven per cent (7%) per annum from the date of the commencement of this action, to-wit: September 24, 1931, together with plaintiff's costs of suit incurred herein, and that upon satisfaction of said Judgment the Clerk of this court should deliver to the defendant the assignment by plaintiff to defendant of claim of plaintiff against the San Francisco Iron & Metal Company, a corporation in bankruptcy. Costs taxed at $58.10.

Judgment entered this 16th day of June, 1934.

WALTER B. MALING,
Clerk. [39]

[Title of Court and Cause.]

To the above entitled Court and to the above named Plaintiff, and to MESSRS. HADSELL, SWEET, INGALLS & LAMB, her attorneys:

YOU WILL PLEASE TAKE NOTICE that hereunto attached is a proposed bill of exceptions as proposed by the defendant in the above entitled action.

Dated: August 21, 1934.

J. ALEXANDER
W. C. BACON
REDMAN, ALEXANDER & BACON
R. P. WISECARVER
Attorneys for Defendant.

Receipt of the within proposed bill of exceptions is hereby admitted this 21st day of August, 1934.

HADSELL, SWEET, INGALLS
& LAMB
Attorneys for Plaintiff. [40]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

The above entitled action regularly came on for trial on the 16th day of May, 1934 at 10:00 o'clock A. M. in the above entitled Court, in the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, and at that time D. Hadsell, Esq. of the firm of Messrs. Hadsell, Sweet, Ingalls & Lamb, appeared as attorney for the plaintiff, and R. P. Wisecarver, Esq. appeared as attorney for the defendant. Thereupon the following proceedings were had:

The Court was advised by respective counsel that the cause had been tried previously and had been on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and was by said Court remanded for a new trial.

THE COURT: It will not take very long. You have got the evidence in the former case, haven't you?

MR. WISECARVER: That is available. However, there is some more evidence to be taken, and

I particularly want to make objection to the incorporation into the record, and argue that at some length, if necessary, of some of the evidence that was put in before because I do not think it is relevant to this pro- [41] ceeding.

* * * * * * * * *

THE COURT: I think we had better take what evidence you have and let you stipulate that the former evidence may be admitted in this case, subject to any objections that were made at the time.

MR. HADSELL: I am perfectly willing to try the case that way.

THE COURT: Any other objections you care to make?

MR. WISECARVER: In that connection I want to make an objection, if Your Honor please, specifically to the incorporation into this record of the entire judgment roll in the case of Berges vs. Abraham, et al.

THE COURT: Did you make that objection before?

MR. WISECARVER: I made that objection before but the Court overruled the objection.

THE COURT: I said subject to the objections that have been made.

MR. WISECARVER: I want to ask Your Honor to rule upon that at this time.

THE COURT: I do not want to rule upon it now. I will rule upon it later. I do not want to go over all of this now.

MR. WISECARVER: I would like to make my objection specific in that connection.

THE COURT: Very well, proceed.

MR. WISECARVER: The suit here is on a judgment. This is an assignment of a judgment. The only thing that they are entitled to put in evidence and that is relevant to that assignment is the judgment. The judgment does not reflect all of the findings, nor are all of the findings germane to the judgment or [42] germane to any issue in that case. I refer particularly to the so-called finding No. 4a of the Berges v. Abraham case. Now, it being numbered 4a, indicates that it was inserted into that finding. The Court has attempted, apparently, to settle the question of rights between the defendants, which was not in issue between the plaintiff and the defendant in that case, by trying to find there that there were certain contractual rights existing between the San Francisco Iron & Metal Company and the other partners. That is not reflected in that judgment on which they are suing, at all. The judgment merely reads this way.

THE COURT: You say it is not. You need not read that judgment.

MR. WISECARVER: It is just against the partners, individually, and as joint adventurers, that is all. It does not give any priority of right against the San Francisco Iron & Metal Company.

THE COURT: You say you object to that.

MR. WISECARVER: Yes. And I want to call your Honor's attention to the fact that the authori-

ties are clear that that is not relevant evidence in this case, in an action on the judgment, because it is not res adjudicata between the parties here, it cannot be relevant unless it does establish the rights between the parties. These parties were joint defendants in the action below, they could not have appealed from that finding, because it was not reflected in that judgment, which merely held they were joint adventurers and partners, individually and jointly, and the rule is stated in 15 Cal. Juris. at page 153, which says, "A judgment is not conclusive as to matters not material and traversable. It does not operate as an estoppel upon immaterial issues not essential thereto, even though findings have been made upon [43] them. Findings which were not necessary to the judgment are not conclusive. An issue and finding is immaterial or collateral if the judgment is in no way dependent upon it."

And again:

"A finding outside the issues, and which does not enter into or form the basis of the judgment is not conclusive, since 'it is the judgment and not the preliminary determination of the court or jury which creates the estoppel'".

Citing many cases there.

THE COURT: You are going to brief the case, aren't you?

MR. WISECARVER: Yes, unless your Honor wishes to have it argued orally.

THE COURT: Orally would suit me, and have the reporter transcribe the argument. I would prefer that to briefs. That is up to you. The objection is overruled and an exception noted. Is all of the evidence taken on the former trial admitted in evidence, subject to the objections taken there and the objection just made?

MR. HADSELL: As far as the plaintiff is concerned, yes.

MR. WISECARVER: I think that is correct. Is there a copy of the transcript on file in this case?

THE COURT: Yes, the Clerk just handed it to me.

MR. WISECARVER: That is not the transcript of the evidence in the record on appeal?

THE COURT: That is a transcript of the record.

MR. HADSELL: I guess there is no question about this, that the Century Indemnity Company had not yet paid anything on account of this claim?

MR. WISECARVER: That is correct. [44]

Thereupon the transcript of testimony at the previous trial, together with the exhibits in connection therewith, was received into evidence as follows:

"THE COURT: There is one phase of the answer that I would like to have amplified a little by defendant's counsel, and that is the feature of another bond having been given.

MR. WISECARVER: That is this, Your Honor: The real party in interest in this suit is the Fidelity & Casualty Company of New York. They gave a release of attachment bond in the same suit for Abraham, who is one of the copartners, to effect the same purpose that The Century Indemnity Company did. The Fidelity & Casualty Company paid that bond, that is, they satisfied that judgment, taking a satisfaction in the name of Miss Nelson. It is our contention that the purchase of the judgment by the surety obligated to pay it is a satisfaction of the judgment, or at least it gives them no greater right than contribution.

THE COURT: You claim a contribution?

MR. WISECARVER: There will be several claims made as the case proceeds, Your Honor. Our claim is that at most it would be a contribution.

THE COURT: You are not claiming exoneration?

MR. WISECARVER: Yes, we are claiming that, too. There are several claims that we make. We claim that it is not a legal assignment.

MR. HADSELL: And we claim that there was no co-suretyship here, Your Honor, even granting all that Mr. Wisecarver has said. The primary party liable was the defendant who put up the bond. Whatever may be the facts with reference to what Mr. Wisecarver [45] has said, since it is not a co-suretyship we are the full owner of the judgment, and, therefore, entitled to the full payment.

The plaintiff thereupon offered in evidence the judgment roll in an action in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 204,568 therein. The defendant objected to the introduction of said judgment roll in evidence upon the ground that "the only thing entitled to go into the record is the judgment on which they are suing, not the judgment roll". The Court overruled the objection. The defendant noted an exception, to which the Court acceded. Thereupon said judgment roll was received in evidence.

The complaint, amendment to complaint, answer and cross-complaint of defendant, order permitting filing of cross-complaint against Goodyear Redwood Lumber Company as cross-defendant, and answer to counterclaim and cross-complaint, as set forth in said judgment roll, were as follows:

"In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, L. SILBERMAN, 1st Doe, 2nd Doe, 3rd Doe, 4th Doe, 5th Doe, 6th Doe, 7th Doe, 8th Doe, 9th Doe and 10th Doe, individually and as

copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, Black-White Company, a corporation, 11th Doe, 12th Doe, 13th Doe, 14th Doe, 15th Doe, 16th Doe, 17th Doe, 18th Doe, 19th Doe and 20th Doe, individually and as copartners doing business under the name of Black-White Company; SAN FRANCISCO IRON & METAL COMPANY, a corporation; 21st Doe, 22nd Doe, 23rd Doe, 24th Doe, 25th Doe, 26th Doe, 27th Doe, 28th Doe, 29th Doe and 30th Doe, individually and as stockholders of SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants. [46]

COMPLAINT

Plaintiff complains and alleges:

FIRST CAUSE OF ACTION

I.

That at all times herein concerned defendants, N. Abraham, H. Silberman, L. Silberman and 1st Doe to 10th Doe were copartners doing business under the name of N. Abraham Mercantile Company; that at all times herein concerned defendant, San Francisco Iron & Metal Company, was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That the true names of 1st Doe to 10th Doe inclusive sued individually and as copartners doing business under the name of N. Abraham Mercantile Company, Black-White Company, a corporation, 11th Doe to 20th Doe inclusive, sued individually and as co-partners doing business under the name of Black-White Company, and 21st Doe to 30th Doe inclusive, sued individually and as stockholders of San Francisco Iron & Metal Company, a corporation, are unknown to plaintiff and they are therefore sued by such names which are fictitious.

III.

That at all times herein concerned, Goodyear Redwood Lumber Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Maine and lawfully operating and transacting business in the State of California.

IV.

That within four years next preceding the commencement of this action, defendants became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61) upon a mutual, open and current book account as and for a balance due for

steel rails sold and delivered by Goodyear Redwood Lumber Company to defendants.

V.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

VI.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage [47] in the sum of $4709.61, all of which is due, owing and unpaid from defendants to plaintiff.

SECOND CAUSE OF ACTION

I.

Plaintiff hereby refers to and incorporates herein paragraphs I, II, and III, of the first cause of action, the same as if here set forth in full.

II.

That within two years next preceding the

commencement of this action, defendants became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61) as and for the reasonable value of steel rails sold and delivered to defendants by Goodyear Redwood Lumber Company.

III.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

IV.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage in the sum of $4709.61, all of which is due, owing and unpaid from defendants to plaintiff.

THIRD CAUSE OF ACTION

I.

Plaintiff hereby refers to and incorporates

herein paragraphs I, II and III of the first cause of action, the same as if here set forth in full.

II.

That within two years next preceding the commencement of this action, defendants agreed to immediately pay Goodyear Redwood Lumber Company the sum of $4709.61 for and in consideration of the sale and delivery by Goodyear Redwood Lumber Company to defendants of certain steel rails; that Goodyear Redwood Lumber Company did sell and deliver said steel rails to defendant.

III.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the [48] claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

IV.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage in the sum of $4709.61, all of

which is due, owing and unpaid from defendants to plaintiff.

FOURTH CAUSE OF ACTION

I.

Plaintiff hereby refers to and incorporates herein paragraphs I, II, and III of the first cause of action, the same as if here set forth in full.

II.

That after the said dealings in this complaint named and before the commencement of this action, the said Goodyear Redwood Lumber Company came to a mutual accounting touching the several matters and things in this complaint mentioned; that on the said accounting, there was found due from the said defendants to said Goodyear Redwood Lumber Company, as a final balance upon said mutual dealing and matters between defendants and Goodyear Redwood Lumber Company the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61); and the plaintiff herein avers that the said stated account is just and true.

III.

That prior to the commencement of this action, said Goodyear Redwood Lumber Com-

pany sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

IV.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage in the sum of $4709.61, all of which is due, owing and unpaid from defendants to plaintiff.

WHEREFORE, plaintiff prays for judgment against said defendants and each of them in the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61), together with interest thereon from date hereof and costs of suit; and for such other and further relief as may be meet in the premises.

ROBERT E. HATCH
Attorney for Plaintiff. [49]

State of California,
City and County of San Francisco—ss.

V. BERGES, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing Complaint and knows the contents thereof and that

the same is true of her own knowledge, except those matters which are therein stated on information or belief and that, as to such matters, she believes it to be true.

V. BERGES

Subscribed and sworn to before me this 6th day of February, 1929.

[Seal] DAISY CROTHERS WILSON
Notary Public in and for the City and County of San Francisco, State of California."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, et al.,

Defendants.

AMENDMENT TO COMPLAINT

For amendment to the complaint on file herein plaintiff further complains and alleges, as paragraphs IV-a of the first cause, II-a of the second cause, II-a of the third cause and II-a of the fourth cause:

That prior to the commencement of this action and for good and valuable consideration, defendant SAN FRANCISCO IRON &

METAL COMPANY, a corporation, agreed to and did assume all of the obligations and liabilities of said N. ABRAHAM MERCANTILÆ COMPANY and of N. ABRAHAM, H. SILBERMAN, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY; that about October, 1927, defendant SAN FRANCISCO IRON & METAL COMPANY received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the [50] payment of the claim and matters herein sued for, but that said defendant SAN FRANCISCO IRON & METAL COMPANY has wholly failed to do.

ROBERT E. HATCH
Attorney for Plaintiff."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, L. SIL-

BERMAN, 1st Doe, 2nd Doe, 3rd Doe, 4th Doe, 5th Doe, 6th Doe, 7th Doe, 8th Doe, 9th Doe, and 10th Doe, individually and as co-partners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, Black-White Company, a corporation, 11th Doe, 12th Doe, 13th Doe, 14th Doe, 15th Doe, 16th Doe, 17th Doe, 18th Doe, 19th Doe and 20th Doe, individually and as co-partners doing business under the name of Black-White Company, SAN FRANCISCO IRON & METAL COMPANY, a corporation, 21st Doe, 22nd Doe, 23rd Doe, 24th Doe, 25th Doe, 26th Doe, 27th Doe, 28th Doe, 29th Doe and 30th Doe; individually and as stockholders of SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

ANSWER

Now come defendants H. Silberman, L. Silberman and San Francisco Iron & Metal Company, a corporation, and in answer to plaintiff's complaint herein, admit, deny and allege as follows:

I.

In answer to the first cause of action set forth in said complaint, said defendants state as follows:

Said defendants admit the allegation of paragraph 1 that at all times herein concerned defendant San Francisco Iron & Metal Company was a corporation, duly organized and existing under and by virtue of the laws of the State of California, but deny that the defendants N. Abraham, H. Silberman and L. Silberman and 1st to 10th Doe were or are copartners doing business under the name of N. Abraham Mercantile Company.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 3 and basing their [51] denial on that ground, deny that Goodyear Redwood Lumber Company was or is a corporation duly organized and existing under and by virtue of the laws of the State of Maine and/or lawfully operating and transacting business in the State of California.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 5, and basing their denial on that ground, deny each and every, all and singular, the allegations of paragraph 5.

Said defendants deny each and every, all and singular, the allegations of paragraph 4, 4a and 6 of said cause of action.

II.

In answer to the SECOND cause of action set forth in said complaint, said defendants state as follows:

Answering paragraph 1, incorporating paragraphs 1, 2 and 3 of the first cause of action, said defendants incorporate herein and make a part hereof, as if fully set forth herein, their answer to paragraphs 1 and 3 of the first cause of action.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 3, and basing their denial upon that ground, deny each and every, all and singular, the allegations of paragraph 3.

Said defendants deny each and every, all and singular, the allegations of paragraph 2, 2a and 4 of said second cause of action.

III.

In answer to the THIRD cause of action set forth in said complaint, said defendants state as follows:

Answering paragraph 1, incorporating paragraphs 1, 2 and 3 of the first cause of action, said defendants incorporate herein and make a part hereof, as if fully set forth herein, their answer to paragraphs 1 and 3 of the first cause of action.

Said defendants have no information suffi-

cient to enable them to answer the allegations of paragraph 3, and basing their denial upon that ground, deny each and every, all and singular, the allegations of paragraph 3.

Said defendants deny each and every, all and singular, the allegations of paragraphs 2, 2a and 4 of said third cause of action.

IV.

In answer to the FOURTH cause of action set forth in said complaint, said defendants state as follows:

Answering paragraph 1, incorporating paragraphs 1, 2 and 3 of the first cause of action, said defendants incorporate herein and make a part hereof, as if fully set forth herein, [52] their answer to paragraphs 1 and 3 of the first cause of action.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 3, and basing their denial upon that ground, deny each and every, all and singular, the allegations of paragraph 3.

Said defendants deny each and every, all and singular, the allegations of paragraph 2, 2a and 4 of said fourth cause of action.

For a FURTHER, SEPARATE and SPECIAL DEFENSE, and by way of COUNTERCLAIM against plaintiffs, defendants allege as follows:

That on or about the 25th day of September, 1926, defendants made and entered into a contract with the Goodyear Redwood Lumber Company, plaintiff's assignor, whereby plaintiff's assignor agreed to sell and deliver to defendants and defendants agreed to purchase 698 net tons of 40-pound railroad relaying steel rails, and to pay for same at the price of $25.00 per ton.

That pursuant to said contract, defendants paid plaintiff's assignor for said 698 net tons of rail at $25.00 per ton.

That plaintiff's assignor delivered only 618 tons of said rail.

That defendant thereby overpaid plaintiff's assignor the sum of $2,000.00.

That of the rails delivered, 243 net tons were junk rail, instead of 40-pound railroad relaying rail, as called for in the contract.

That the value of said junk rail was and is $12.50 per ton and the difference in value between the said junk rail, so delivered as aforesaid, and the value of the rail required to be delivered under the terms of said contract, was and is the sum of $3075.00.

That by reason of the said delivery by plaintiff's assignor to defendants of said 243 net tons of junk rail, defendants were damaged in the sum of $3075.00.

WHEREFORE, defendants pray that plaintiff take nothing and that defendants have judgment against plaintiff in the sum of $5075.00, together with interest and costs of suit.

BROWNSTONE & GOODMAN

Attorneys for Defendants H. Silberman, L. Silberman San Francisco Iron & Metal Co."

[53]

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, et al.

Defendants.

H. SILBERMAN, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants and Cross-Complainants

vs.

GOODYEAR REDWOOD LUMBER COMPANY, a corporation,

Cross-Defendants.

CROSS-COMPLAINT

Now come defendants and cross-complainants above named and for cause of action against cross-defendant above named, allege as follows:

1—That at all times herein mentioned San Francisco Iron & Metal Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

2—That at all times herein mentioned, the Goodyear Redwood Lumber Company was and now is a corporation, doing business in the State of California.

3—That on or about the 25th day of September, 1926, cross-complainants made and entered into a contract with the Goodyear Redwood Lumber Company, cross-defendant, whereby cross-defendant agreed to sell and deliver to cross-complainant, and cross-complainants agreed to purchase, 698 net tons of 40-pound railroad relaying steel rails, and to pay for same at the price of $25.00 per ton.

4—That pursuant to said contract cross-complainants paid cross-defendants for said 698 net tons of rail at $25.00 per ton.

5—That cross-defendant delivered only 618 tons of said rail.

6—That cross-complainants thereby overpaid cross-defendant the sum of $2,000.00.

7—That of the rails delivered, 243 net tons were junk rail instead of 40-pound railroad relaying rail, as called for in the contract.

8—That the value of said junk rail was and is $12.50 per [54] ton and the difference in value between the said junk rail so delivered as aforesaid and the value of the rail required to be delivered under the terms of said contract, was and is the sum of $3075.00.

9—That by reason of the said delivery by cross-defendant to cross-complainants of said 243 net tons of junk rail, cross-complainants were damaged in the sum of $3075.00.

10—W H E R E F O R E, cross-complainants pray for judgment against cross-defendant in the sum of $5075.00, together with interest and costs of suit.

BROWNSTONE & GOODMAN
Attorneys for Defendants and Cross-Complainants.

State of California,
City and County of San Francisco—ss.

L. H. SILBERMAN, being first duly sworn, deposes and says: that he is one of the Defendants and Cross-complainants named in the foregoing action; that he has read the foregoing answer and cross-complaint and knows the contents thereof and same is true of his own knowledge, except as to those matters therein

stated on information and belief, and as to those matters he believes it to be true.

L. H. SILBERMAN

Subscribed and sworn to before me this 23rd day of March, 1929.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. Berges,

Plaintiff,

vs.

N. Abraham, et al.

Defendants.

ORDER

Good cause appearing therefor, it is hereby, ORDERED, that Goodyear Redwood Lumber Company, plaintiff's assignor herein, be and the said Goodyear Redwood Lumber Company is hereby made a party to the above entitled action, and defendants be and they are hereby permitted to file a cross-complaint [55]

herein against the said Goodyear Redwood Lumber Company, as cross defendant.

Dated: March 21, 1929.

JAMES G. CONLAN
Judge."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, et al.,

Defendants.

H. SILBERMAN, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants and Cross-Complainants.

vs.

GOODYEAR REDWOOD LUMBER COMPANY, a corporation,

Cross-Defendant.

ANSWER TO COUNTERCLAIM

V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY, answering the counterclaim on file herein, allege and deny, as follows:

I.

Deny each and every allegation of said counterclaim appearing on pages four and five of the answer; deny that on or about the 25th day of September, 1926, or at any other time, defendants or either of them made and/or entered into a contract with the Goodyear Redwood Lumber Company whereby Goodyear Redwood Lumber Company agreed to sell and/or deliver to defendants, or otherwise, and/or that defendants agreed to purchase 698 net tons, or any other quantity, of 40-pound railroad relaying steel rails and/or to pay for same at the price of $25.00 a ton, or any other sum; deny that Goodyear Redwood Lumber Company delivered 618 tons of rail, or any other quantity, only or otherwise; deny that defendant thereby, or otherwise overpaid plaintiff's assignor the sum of $2,000.00, or any other sum; deny that any rails delivered were junk rail, or that there was any contract calling for 40-pound railroad relaying rail, or anything else; deny that the value of any rail was and/or is $12.50 per ton, or any other sum, [56] and deny that the difference in value between any rail was and/or is the sum of $3,075.00, or any other sum; deny that by or for any reason defendants were damaged in the sum of $3,075.00, or any other sum.

II.

Further answering said counterclaim, allege that said counterclaim does not state facts sufficient to constitute a defense or counterclaim.

WHEREFORE, V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY pray that defendants take nothing and that V. Berges and Goodyear Redwood Lumber Company have judgment against defendants and each of them for their costs of suit and for such other relief as may be proper.

ANSWER TO CROSS-COMPLAINT

V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY, answering the cross-complaint herein, being part of and attached to the answer on file herein, deny and allege as follows:

I.

Specifically deny each and all of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, and 9 inclusive.

II.

Further answering said cross-complaint, allege that said cross-complaint does not state facts sufficient to constitute a defense or cross-complaint.

WHEREFORE, V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY

pray that cross-complainants take nothing and that cross-defendants have judgment against cross-complainants and each of them for their costs of suit and for such other relief as may be proper.

ROBERT E. HATCH,
Attorney for V. Berges and Goodyear Redwood Lumber Company.

State of California,
City and County of San Francisco—ss.

V. BERGES, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing answer to counterclaim and answer to cross-complaint and knows the contents thereof and that the same is true of her own knowledge, except those matters which are therein stated on information or belief and that, as to such matters, she believes it to be true.

V. BERGES.

Subscribed and sworn to before me this 2nd day of April, 1929.
[Seal] DAISY CROTHERS WILSON,
Notary Public, in and for the City and County of San Francisco, State of California." [57]

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 204,668.
Dept. Extra Session 3.

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation, individually and as co-partners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

FINDINGS.

This action came regularly on for trial before the above-entitled Court, Hon. Walter E. Herzinger, Judge thereof, without a jury, on August 26, 1929, Robert E. Hatch appearing as attorney for plaintiff V. Berges, Messrs. Bianchi & Hyman by A. B. Bianchi appearing as attorneys for defendant Abraham, and Messrs. Brownstone & Goodman by Louis E. Goodman appearing as attorneys for defendants Silberman and San Francisco Iron & Metal Company, and the parties being personally pres-

ent in Court. Thereupon evidence on behalf of the respective parties hereto was duly given and received by said Court and the trial of said action was continued from day to day and, upon the evidence being closed, arguments and briefs by counsel were made and submitted to the Court and the Court, having duly considered the evidence and the law and [58] being fully advised in the premises, does now find the facts herein as follows, to-wit:

FACTS.

I.

That at all times herein concerned and particularly from July 1, 1926, to December 1, 1927, defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, were joint adventurers and were co-partners doing business under the name of N. Abraham Mercantile Company; that at all times herein concerned, particularly from July 1, 1926, until the present time, San Francisco Iron & Metal Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That the true names of First Doe to Tenth Doe inclusive, sued individually and as copart-

ners doing business under the name of N. Abraham Mercantile Company, were unknown to plaintiff up to the time of the trial in this case and they were therefore sued by such names which were fictitious names; that during said trial and before its date plaintiff duly requested and received from this Court leave to amend the complaint in this action by substituting in and amending said complaint to read "San Francisco Iron & Metal Company, a corporation" in the place and stead of "First Doe" and that plaintiff did duly so amend and substitute; that defendant San Francisco Iron & Metal Company did in open Court stipulate that such amendment and substitution be made and the parties hereto by and through their respective counsel above named did during said trial stipulate and agree that defendant did deny the allegation of the complaint as to said amendment and substitution.

III.

That at all times herein concerned, particularly from July 1, 1926, to the present time, Goodyear Redwood Lumber Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Maine and lawfully operating and transacting business in the State of California.

IV.

That within four years next preceding the commencement of this action defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars upon a mutual, open and current book account as and for a balance due as of December 10, 1926, for steel rails sold by said Goodyear Redwood Lumber Company to said defendants.

IV-a.

That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company; [59] that prior to the commencement of this action, defendant San Francisco Iron &

Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considerations specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so.

V.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to V. Berges all of its right, title and interest in and to the claim and matters hereinabove set forth and that plaintiff is still the owner and holder thereof.

VI.

That plaintiff has duly demanded of defendants said sum of money last mentioned but that, at all times herein concerned and up to the present time, defendants have refused to pay to plaintiff said sum; all to plaintiff's damage in the sum of Four Thousand Seven Hundred Nine

and 61/100 ($4,709.61) Dollars as of December 10, 1926, all of which is due, owing and unpaid from said defendants to said plaintiff.

VII.

That the matters alleged in defendant's answers contrary hereto are not true and particularly the Court finds the following to be untrue; that Goodyear Redwood Lumber Company delivered to defendants less quantity or quality of steel rails than was agreed and contracted by the parties to be delivered; that defendant or defendants overpaid Goodyear Redwood Lumber Company in anywise deficient or of less quality or value than agreed to be delivered; that defendant or defendants were damaged in any sum; and the Court specially finds that no evidence of any kind or character was offered or received in support of the cross-complaint or counter-claim or separate or special defenses of the defendants and further finds that said cross-complaint, counter-claim and separate and special defenses were at the time of trial abandoned by the defendants.

SECOND CAUSE OF ACTION.

I.

That each and every of the findings herein numbered I, II and III are adopted and made part of the findings of this Court as to the second cause of action.

II.

That the Court further finds, as and for paragraph IV, that within two years next preceding the commencement of this action, defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, as of December 10, 1926, as and for the reasonable value of steel rails sold and delivered to said defendants by Goodyear Redwood Lumber Company.

III.

That each and every of the findings herein numbered IV-a, V, VI and VII are adopted and made part of the findings of this Court [60] as to the second cause of action.

THIRD CAUSE OF ACTION

I.

That each and every of the findings herein numbered I, II and III are adopted and made part of the findings of this Court as to the third cause of action.

II.

The Court further finds, as and for paragraph IV, that within two years next preceding the commencement of this action, defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, agreed to immediately pay Goodyear Redwood Lumber Company the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars for and in consideration of the sale and delivery by Goodyear Redwood Lumber Company to said defendants of certain steel rails; that Goodyear Redwood Lumber Company did sell and deliver said steel rails to said defendants.

III.

That each and every of the findings herein numbered IV-a, V, VI and VII are adopted and made part of the findings of this Court as to the third cause of action.

FOURTH CAUSE OF ACTION.

I.

That each and every of the findings herein numbered I, II and III are adopted and made part of the findings of this Court as to the fourth cause of action.

II.

That the Court further finds, as and for paragraph IV, that after the dealings in the complaint named and before the commencement of this action, the said Goodyear Redwood Lumber Company came to a mutual accounting touching the several matters and things in the complaint mentioned; that on the said accounting, there was found due from defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, to said Goodyear Redwood Lumber Company, as a final balance upon said mutual dealings and matters between said defendants and Goodyear Redwood Lumber Company the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars; and that the said stated account is just and true.

III.

That each and every of the findings herein numbered IV-a, V, VI and VII are adopted and made part of the findings of this Court as to the fourth cause of action. [61]

From the foregoing facts, the Court makes the following

CONCLUSIONS OF LAW.

I.

That plaintiff V. Berges is entitled to and it is hereby ordered that she have judgment against defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, for the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, with interest thereon at the rate of seven per cent per annum from December 10, 1926, until date of this judgment, together with her costs of action.

II.

That defendants are not entitled to any relief or to recover anything in this action on said counter-claim or cross-complaint.

Let judgment and decree be entered accordingly.

Done in Open Court this 8th day of October, 1929.

WALTER E. HERZINGER,
Judge of said Superior Court."

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 204,668.
Dept. Extra Session No. 3

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation, individually and as copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

JUDGMENT.

This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the Court made and filed its findings of fact and conclusions of law. Pursuant thereto, IT IS HEREBY ORDERED, ADJUDGED AND DECREED: [62]

1. That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as

joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $112.40.

2. That defendants take nothing by reason of their counterclaim and cross-complaint.

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM,

Defendant.

State of California,
City and County of San Francisco—ss.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled cause, and recorded in Judgment Book 305 of said Court at page 67. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

WITNESS my hand and seal of said Superior Court this 11th day of November, A. D. 1929.

H. I. MULCREVY,
Clerk.
By J. D. Devlin,
Deputy Clerk."

By consent of both parties the rest of the judgment roll is not inserted herein, because it is deemed that the foregoing portions of the judgment roll sufficiently cover any matters in such judgment roll which are material to the issues in this case and useful in determining the same.

The plaintiff also offered in evidence by and through said Harold Emmal, Esq., in the aforesaid action a writ of attachment issued therein, dated February 13, 1929, to the Sheriff of the City and County of San Francisco for the sum of Forty-seven [63] Hundred Nine Dollars and Sixty-one Cents ($4709.61), with interest and costs, and directing the Sheriff to attach and safekeep all of the property of the defendants, which writ of attachment was entered as received by the Sheriff on February 13, 1929, and was endorsed and filed by the Clerk of said City and County of San Francisco on March 4, 1929, and which writ had attached thereto the following:

"Return of Garnishment.
Office of the Sheriff
of the City and County
of San Francisco.

By virtue of the annexed writ, I duly attached and levied upon, on the twenty-third day of February, A. D. 1929, at 9:45 o'clock A.M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of Bank of America of California, 108 Sutter Street, belonging to the defendants named in said writ, or to either of them, by delivering to and leaving with W. A. Sandris, Asst. Cashier, personally, in the City and County of San Francisco, a copy of said writ with a notice in writing that said property was attached and levied upon, and not to pay or transfer the same to any one by myself.

Statement demanded.

Answers as follows, to-wit:

ACCEPTED SERVICE BUT MADE NO STATEMENT.

W. J. FITZGERALD,
Sheriff.

By H. J. Sung,
Deputy Sheriff.

Released by order of Pltff's Att'y. Feb. 26, 1929."

"Return of Garnishment.
Office of the Sheriff
of the City and County
of San Francisco.

By virtue of the annexed writ, I duly attached and levied [64] upon, on the 13th day of February, A. D. 1929, at 3:00 o'clock P. M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of Anglo London and Paris National Bank belonging to the defendants named in said writ or to either of them, by delivering to and leaving with A. Armstrong, Ass't Cashier, personally, in the City and County of San Francisco, a copy of said writ with a notice in writing that such property was attached and levied upon, and not to pay or transfer the same to any one but myself.

Statement demanded.

Answer as follows, to-wit:

NO ANSWER.

W. J. FITZGERALD,
Sheriff.

By W. J. Carr,
Deputy Sheriff.

Released by order of Pltff's Att'y. Feb. 26, 1929.

Released, defd't having filed a bond 2/14/29 as to one defendant."

"Return of Garnishment.
Office of the Sheriff,
City and County of
San Francisco.

By virtue of the annexed writ of attachment I duly levied upon and took into my possession on the 13th day of February, A. D. 1929, certain personal property in the City and County of San Francisco as property of the therein named defendants, to-wit:

Part contents of store located at 1133 Market Street, consisting of gent's furnishing goods, stock in trade, keeper in charge.

W. J. FITZGERALD,
Sheriff.

By W. J. Carr,
Deputy Sheriff. [65]

Released by order of Pltff's Att'y, Feb. 26, 1929.

Released, Defd't having filed a bond as to one defd't."

"Return of Garnishment.
Office of the Sheriff,
City and County of
San Francisco.

By virtue of the annexed writ of attachment, I duly levied upon and took into my possession

on the 13th day of February, A. D. 1929, certain personal property in the City and County of San Francisco as property of the therein named defendants, to-wit:

Part contents of place of business, located at 2301 Stockton Street, consisting of iron rails, iron beams, two cranes, iron plates and office fixtures, stock in trade, keeper in charge.

Released by order of Pltff's Atty. Feb. 26, 1929.

W. J. FITZGERALD,
Sheriff.

By W. J. Carr,
Deputy Sheriff.

Released, defd't having filed a bond as to one defd't."

The defendant objected to the introduction of the foregoing documents "as being immaterial, irrelevant and *im*competent in this proceeding," The Court overruled the objection and the defendant excepted and the documents were received in evidence.

VIVIAN BERGES,

called for plaintiff, testified as follows:

I am that V. Berges, who was the plaintiff in the action of V. Berges vs. Abraham, the Silbermans and the San Francisco Iron & Metal Company. I

(Testimony of Vivian Berges.)

signed the assignment of judgment in that case from myself to G. Nelson. The assignment bears the signature of Robert E. Hatch, attorney for the plaintiff in that case. I was [66] one of the stenographers in Mr. Hatch's office when that suit was brought. I was acting only as an assignee for collection for the lumber company. The lumber company was the real party in interest. I did not get any money in satisfaction of that judgment myself, nor did I get any money in payment of the judgment. I presume that any money was paid to the lumber company for which I was the assignee for collection. I am not familiar about the facts of the case.

I do not recollect whether I have seen this assignment before. I don't believe I read it and I don't think I knew anything about the contests of it, but that is my signature to it.

LEWIS N. MITCHELL,

also called as a witness for the plaintiff, testified as follows:

Direct Examination

I am one of the partners in the firm of Hadsell, Sweet & Ingalls. I prepared the Assignment of Judgment. I had the document signed by V. Berges and Robert E. Hatch, the attorney for the plaintiff in that suit. Then the assignment was returned to me,

(Testimony of Lewis N. Mitchell.)

after it was signed by those parties at the date shown in the assignment. I was acting for G. Nelson in getting that assignment. At the same time, the stipulation mentioned in paragraph IV of plaintiff's complaint and the undertaking on release of attachment mentioned in paragraph III of the plaintiff's complaint were delivered to me by Attorney Robert E. Hatch. Mr. Goodman was attorney for the defendants San Francisco Iron & Metal Company and the Silbermans. The assignee in this assignment, G. Nelson, is an employee in the office of Hadsell, Sweet & Ingalls and is the G. Nelson who is the plaintiff in the suit here on trial. [67]

Cross-Examination.

MR. WISECARVER. Q. Mr. Mitchell, at the time that you prepared this assignment of judgment that is so entitled, were you acting solely for G. Nelson.

MR. HADSELL. If the Court please. I want to enter a formal objection to the question on the ground that it is immaterial, irrelevant and incompetent, because we claim that, having taken an assignment, the plaintiff is entitled to go ahead regardless of what happened in taking the assignment. I have no objection to taking the evidence, however, so that the Court will have all the evidence before it. I just want to reserve the point.

THE COURT. Objection overruled. May I see the assignment?

(Testimony of Lewis N. Mitchell.)

MR. HADSELL. May it be understood that that objection goes to all this line of questions. Mr. Wisecarver, dealing with the purpose of the assignment, and the rest of it, so far as the Fidelity & Casualty Company is concerned?

MR. WISECARVER. I don't know just how far you want to go with that.

MR. HADSELL. I don't want to make objection after objection if I can have that understanding.

MR. WISECARVER. All right, let us just have that understanding as to this witness.

MR. HADSELL. All right, and I will reserve my exception, if the Court please.

A. Do you mean, Mr. Wisecarver, was I acting for some person other than G. Nelson?

MR. WISECARVER. Q. Yes.

A. The firm of Hadsell, Sweet & Ingalls were attorneys for the Fidelity & Casualty Company of New York. In taking this [68] assignment and in purchasing this judgment from the plaintiff, V. Berges, I was acting for the Fidelity & Casualty Company of New York. The judgment, under those circumstances, was assigned to G. Nelson. G. Nelson, I might say, held the judgment. It was taken by her for the benefit of the Fidelity & Casualty Company, and the cash was paid—the amount that is shown there.

Q. G. Nelson is a stenographer in your office?

A. Yes.

(Testimony of Lewis N. Mitchell.)

Q. And the Fidelity & Casualty Company of New York had issued a release of attachment bond for N. Abraham in the same proceeding in which this assignment appears, had it not?

A. I believe there was a release of attachment bond issued by the Fidelity & Casualty Company, wherein N. Abraham was named as the principal. If I could be shown that bond I would recall more about it. There was such a bond. I don't recall the date of it now, or what was in the bond, exactly.

Q. I show you a document purporting to have been executed by the Fidelity & Casualty Company of New York, and ask you if that is the document to which you refer?

A. I believe this is the document.

Q. At the time you received the papers that you identify, the assignment of judgment and the stipulation and the undertaking on the release of attachment that you have mentioned, did you receive from Mr. Hatch, the attorney for V. Berges, this bond I have just shown you, executed by the Fidelity & Casualty Company of New York?

A. My recollection is that was handed to me with the other papers at the same time.

Q. What did you do with that bond of the Fidelity & Casualty Company of New York? [69]

A. I put it in my files with the other papers, or else I returned it to the Fidelity & Casualty Company of New York, one of the two.

(Testimony of Lewis N. Mitchell.)

Q. Is it not a fact you did return it to the Fidelity & Casualty Company of New York?

MR. HADSELL. I will stipulate that it was returned.

A. My recollection was just a little dim on that, but I think it was, but just the day or how soon afterwards it was I cannot say at this time.

MR. WISECARVER. Mr. Hadsell has so stipulated.

Q. You say you are the attorney for the Fidelity & Casualty Company of New York?

A. Yes, the firm is.

Q. And you are a member of the firm?

A. Yes.

Q. And the Fidelity & Casualty Company of New York is a surety company regularly engaged in the business of executing surety bonds of this character in the State of California, and was at that time?

A. Yes.

Q. That is of your own knowledge?

A. To the best of my knowledge it was and is.

MR. WISECARVER. I will ask at this time that the bond of the Fidelity & Casualty Company be entered as an exhibit in the case.

THE COURT. So ordered.

(The document was here marked "DEFENDANT'S EXHIBIT A").

MR. WISECARVER. Q. In procuring this assignment of judgment who was it that provided the funds for the purchase of that assignment. [70]

(Testimony of Lewis N. Mitchell.)

A. The Fidelity & Casualty Company of New York. The funds were delivered to me, as I recall it, and they were deposited to the account of Miss Nelson; the funds were delivered to her and they were put in her account, in the Mercantile Trust, or in the American Trust Company, as I recall it, and thereupon she issued her check in purchase of this judgment to the plaintiff. Her check was made out personally to V. Berges, and as I recall it V. Berges endorsed the check and the check was cashed.

Q. The ownership of the fund was in the Fidelity & Casualty Company, that is, she was holding it for them as trustee, and paid the judgment for them under that arrangement.

A. I don't know whether that calls for my conclusion or not, but these are the facts as I recollect them: The funds were delivered to me; I gave the funds to Miss Nelson, or else they were issued to her direct, I don't recall which. She made a deposit in her own account. Then she issued her check for the same identical amount payable to V. Berges, in the purchase of the judgment.

Q. And at that time you were acting for the Fidelity & Casualty Company of New York?

A. Yes.

Q. And as their attorney, they delivered these funds to you for the purpose of purchasing the judgment?

A. Yes, that is correct, for the purpose of purchasing an assignment of the judgment.

(Testimony of Lewis N. Mitchell.)

MR. HADSELL. I offer this assignment in evidence if the Court please.

MR. WISECARVER. To which we object as immaterial, irrelevant, incompetent.

THE COURT. Objection overruled.

MR. WISECARVER. Exception. [71]

The assignment was then received in evidence and reads as follows:

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 204,668.

Dept. Extra Session No. 3.

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation, individually and as copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

ASSIGNMENT OF JUDGMENT.

In consideration of the sum of Five Thousand Eight Hundred Fifty-seven and 96/100 Dollars

($5,857.96), gold coin of the United States to me paid, I do hereby sell, assign, and transfer to G. Nelson without recourse the judgment heretofore given, made and entered in the above entitled action on the 10th day of October, 1929, and entered in Judgment Book 305, at page 67, in the office of the clerk of the above entitled Court, in favor of the plaintiff V. Berges and against the defendant N. Abraham in the sum of Five Thousand Six Hundred Forty-three and 65/100 Dollars ($5,643.65) and One Hundred Twelve and 50/100 Dollars ($112.50) costs, together with interest on said total sum of Five Thousand Seven Hundred Fifty-six and 15/100 Dollars ($5,756.15) at the rate of 7% per annum, and against San Francisco Iron and Metal Company, a corporation, and L. Silberman in the sum of Five Thousand Six Hundred Forty-three and 65/100 Dollars ($5,643.65) and Sixty-nine and 90/100 Dollars [72] ($69.90) costs, together with interest thereon at the rate of 7% per annum or said total sum of Five Thousand Seven Hundred Thirteen and 55/100 Dollars ($5,713.55) for her full use and benefit; hereby authorizing her to collect and enforce payment thereof in my name or otherwise, or to prosecute the said cause on appeal in my name or otherwise but at her own costs and charges, and to take out execution in my name or otherwise, and to take in my name or otherwise, all lawful ways

and means for the affirmance of said judgment and the prosecution of said cause on appeal, and the undersigned does hereby covenant that she has not satisfied said judgment and that she will not collect or receive the proceeds of the said judgment, or any part thereof, or release, or discharge the said judgment, and will allow all lawful proceedings therein.

Dated, Feb. 21/30.

V. BERGES.

Approved.

ROBERT E. HATCH,
Attorney for Plaintiff, V. Berges.

[Endorsed]: Filed July 27, 1931. H. I. Mulcrevy, Clerk, by H. Brunner, Deputy Clerk".

GEORGIE NELSON,

called as a witness for the plaintiff, testified as follows:

I am the G. Nelson that is mentioned in the assignment of the judgment from V. Berges to G. Nelson. I received a check from the Fidelity & Casualty Company and took the check and in company with Mr. Mitchell went to the American Trust Company where I deposited it in my account. I draw another check payable to [73] V. Berges and handed it to Mr. Mitchell. That is the last I saw of that check. That was the transaction to which Mr. Mitchell was referring when he testified in this case. Since that

(Testimony of Georgie Nelson.)

time nobody has paid me the amount of that judgment, or any part of it. That judgment is still in my name. I have not assigned it to anybody, nor have I issued any satisfaction of that judgment to anybody. I understood I was holding this judgment for the Fidelity & Casualty Company of New York. I did not put any of my funds into the purchase of it.

Q. These funds that were supplied at the time by the Fidelity & Casualty Company of New York were for the purpose of purchasing for their account that judgment?

A. Yes, sir.

Q. And you so understood it?

A. I so understood it.

Q. And you now hold it in trust for them?

A. Yes.

Q. And you are now holding it, I say, in trust for them?

A. I am.

Thereupon the following occurred:

MR. HADSELL. We herewith deliver to the Clerk of the Court, for the benefit of the defendant, an assignment by G. Nelson of the unsecured debt evidenced by this proof of claim, for the purpose of turning over that claim and any rights under it to this defendant in the event, of course, that judgment is rendered here against this defendant and paid.

They should be entitled to that asset for whatever value there may be in it. So, for that limited purpose, we hand in this assignment to the Clerk for delivery under those conditions. [74].

MR. WISECARVER. We object to that as immaterial, irrelevant and incompetent in this proceeding at this time. It is premature.

MR. HADSELL. Well, whether it is premature, or not, I want to have it done so there will be no question of that kind raised.

MR. WISECARVER. This is not an equitable proceeding, it is an action at law.

THE COURT. That is the point I have in mind. If you have a right to recover here it is because of the law. That is one of the points of the defense, that you have not brought a suit in equity, but you have brought an action at law.

MR. HADSELL. My view is that this case started in the Superior Court of the State of California, in and for the City and County of San Francisco, where there is no distinction between law and equity, such as there is in the Federal Court. If in the State Court we could consider the equities of the matter, then by transferring it to this Court they cannot deprive us of that right.

THE COURT. In other words, you think that the conformity statute would apply here to the extent that defenses that are available in the State Courts of California would likewise be available here?

MR. HADSELL. Yes, or replication. Our position will be that of replication under the State statutes.

THE COURT. We will not argue that now. I will hear you on that at the end of the case. The assignment can be left with the Clerk. It is not necessary to rule on that objection at this time. The proffer has been made, and the Clerk will accept the proffer subject to such further determination as the Court may make in the case. [75]

ROBERT E. HATCH,

called for the plaintiff then testified:

Direct Examination.

I was the attorney for the plaintiff in the case of Berges v. Abraham, et al. I signed the stipulation on which appears in paragraph IV of plaintiff's complaint and procured the signature thereto of Mr. Goodman. The bond, which is mentioned in paragraph III of plaintiff's complaint, was delivered to me in connection with that case by one of the young men in Mr. Goodman's office. My recollection is that that bond was retained in my office during the pendency of the Superior Court action No. 204,668, and, at least, until such time as the judgment was entered in favor of the plaintiff. I don't think that bond was ever in the possession of the Sheriff. I examined the bond and felt that before I ordered the attach-

(Testimony of Robert E. Hatch.)

ment released I should have a stipulation in the form of this one which I prepared. After I got the bond, I gave the release of attachment. The release was ordered by me as the result of having obtained the bond and not otherwise. The signature to the assignment of the judgment in the case of Berges v. Abraham et al. was affixed in my presence by Miss Berges, at my request. Mr. Mitchell presented that document and had it signed in my office and took it back with him.

Q. I will ask you whether or not, as long as Miss Berges remained the legal holder of the judgment, she ever, as far as you know, gave any satisfaction of judgment as distinguished from an assignment of judgment?

A. I am positive that she did not.

MR. WISECARVER. Q. That is only in so far as you know?

A. Surely. [76]

Cross-Examination.

At the time of the execution of the assignment, I turned the assignment and bond over to Mr. Mitchell. I considered myself finished with the case and gave Mr. Mitchell whatever papers out of my file that he wanted and I think that it included and that he took The Century Indemnity Company's bond.

Q. Refreshing your recollection and showing you this bond of the Fidelity & Casualty Company, I

(Testimony of Robert E. Hatch.)

ask you if you gave him that bond at that time?

A. I will state my recollection on that to the best of my ability, and that is, that both of these bonds and the stipulations connected with the bonds were maintained in my office and delivered to Mr. Mitchell; I am not certain as to that, and I am somewhat doubtful, in view of your statement, Mr. Wisecarver, about two days ago, that one of these bonds, as I understood you, had been filed in the Sheriff's office. My recollection is that both of the bonds were maintained in my office. If the Sheriff's office records indicate to the contrary I would not dispute them.

Q. The bond of the Fidelity & Casualty Company you have seen * * * it was in your office?

A. Yes. It has my handwriting on the back, "Burges vs. Abraham."

Q. And that was given to you as the attorney for the plaintiff in that action?

A. Yes.

Q. And did you release an attachment against N. Abraham on account of that bond being delivered to you? [77]

A. I think I did; in other words, we had property of both Abraham and the San Francisco Iron & Metal Company under attachment; two separate bonds were issued, two separate stipulations taken, and so far as I recall it all of the attachments released.

Q. Is it not a fact that the bond of The Century Indemnity Company was filed with the Sheriff?

(Testimony of Robert E. Hatch.)

A. I don't know. There is no indication on here that it was.

Q. Your answer is that you don't recollect about that?

A. I do not. Mr. Hadsell can tell you where he got the bond. I don't know. If it was in my files he was given the privilege of taking it. Whether he got it from my files, or got it from the Sheriff, I don't recall.

Q. With reference to that assignment, so far as you were concerned you were disposing of the judgment at that time, were you not?

A. I can only give you a legal analysis, I guess, of the assignment. I sold, on behalf of the plaintiff, all of her right, title and interest in and to the subject matter of that action. Having so done, I do not recall that we figured that we had anything left. So I suppose that, within your question, that would be a disposal.

Q. Did you receive a full payment of the amount of that judgment in cash?

A. I don't recall the amount of the judgment, but we received the sum that is recited in the assignment, $5,827.96.

Q. There was no purchase of that for a less sum than the actual amount shown on the face of the assignment?

A. I cannot answer that directly, excepting that the amount of the judgment, I believe, was either dif-

(Testimony of Robert E. Hatch.)

ferent as to several defendants, or the amount of costs * * * no, I think it [78] was this, the cost bills filed were different as against the different defendants; in other words, we had a keeper in charge on the Abraham attachment that the attorneys for the Silbermans and the San Francisco Iron & Metal Company claimed that they did not owe, that is, that it was not a proper charge against them. So I think we figured that there was a different amount due from the Silbermans and the San Francisco Iron & Metal Company than on the Abraham interest.

Q. What I am asking you is this: Do you recollect whether or not you received the full amount of cash that is stated as the consideration for that assignment?

A. My recollection is that we received the sum of $5,827.96, recited in the assignment of judgment that has been referred to. The Court has just handed me the judgment roll in the Superior Court action. It shows that the amount of the judgment was $5,634.65 and costs $112.40. I believe that Mr. Goodman claimed that we should not hold him for the full amount of the costs because of the fact, as I say, that part of these were keeper's fees as to the defendant Abraham. I do not recall at this time how the amount that was paid to us for the assignment was computed.

THE COURT. Q. The judgment, however, was against all of the defendants in the same amount?

(Testimony of Robert E. Hatch.)

A. That is correct.

Q. That changes your recollection, does it not?

A. No, my recollection is that the judgment was entered in that way, but I conceded to Mr. Goodman that we should not hold him for the other man's costs.

MR. WISECARVER. Q. You did not consider that there was any remainder of that judgment remaining in the plaintiff after [79] that assignment?

A. No. I had forgotten all about the case after we received our money.

Q. You received the full amount you considered the plaintiff was due?

A. Yes.

Thereupon, as DEFENDANT'S EXHIBIT A, the defendant introduced the following undertaking on release of attachment:

"Premium charged for this bond is the sum of $60.00 per annum.

Bond No. 1,225,008.

In the Superior Court of the City and County of San Francisco, State of California.

N. ABRAHAM, et al.,

Defendant,

vs.

V. BERGES,

Plaintiff.

UNDERTAKING ON RELEASE OF ATTACHMENT.

WHEREAS, the above named plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above named defendants claiming that there was due to said plaintiff from said defendants the sum of Forty Seven Hundred Naught Nine and 61/100 ($4,709.61) Dollars or thereabouts, and thereupon an attachment issued against the property of said defendants as security for the satisfaction of any judgment that might be recovered therein; and certain property and effects of the said defendants have been attached and seized by the Sheriff of the said San Francisco County, under and by virtue of the said writ; [80]

AND WHEREAS, the said defendant N. Abraham is desirous of having said property released from said attachment;

NOW, THEREFORE, the undersigned, The Fidelity and Casualty Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment, of the property attached, as above mentioned, does hereby undertake in the sum of Six

Thousand and 00/100 ($6,000.00) Dollars, and promise that in case the plaintiff recover judgment in the action, defendants will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or in default thereof, that the defendants will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the interests and costs; the same to be paid in United States Gold Coin, if so required by the terms of the judgment.

IN TESTIMONY WHEREOF, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney at San Francisco, California, on the 21st day of February, A. D. 1929.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

[Seal] By W. L. Dawson, Attorney.

(Undertaking on Attachment, California.)

Bond 1236,250

(2301146)"

Thereupon the following proceedings took place:

[81]

MR. WISECARVER. Will your Honor just grant me a moment? I don't know that it will be

necessary for us to introduce any evidence at all, your Honor, because I think the matter has been pretty well covered. Mr. Hadsell has just stated that he will stipulate that the bond of the Fidelity & Casualty Company that has heretofore been identified as Defendant's Exhibit A was issued by the Fidelity & Casualty Company of New York for N. Abraham in that same proceeding of V. Berges v. N. Abraham, et al., No. 204668, in the Superior Court of the State of California in and for the City and County of San Francisco, and was for the release of certain property of N. Abraham attached in that proceeding, and that it was delivered to plaintiff's attorney and was by him returned to Mr. Hadsell's office at the time of the execution of the assignment which has been referred to in this proceeding.

MR. HADSELL. And that this bond related solely to the release of the attachment as against N. Abraham.

MR. WISECARVER. That this bond was issued. It is a matter of legal interpretation as to what it relates.

MR. HADSELL. No. That was the purpose of the bond, to release the attachment against N. Abraham only. I am willing to stipulate to that, but no further.

MR. WISECARVER. That this bond was issued for N. Abraham to release an attachment in that proceeding.

MR. HADSELL. To release an attachment against N. Abraham. That is as far as I will go.

Not as against the other defendant. That is as far as I am willing to stipulate.

MR. WISECARVER. You will stipulate that an attachment was issued, and that this bond was issued in that proceeding?

MR. HADSELL. To release the attachment against his property only. [82]

MR. WISECARVER. And that such attachment was released in that proceeding on account of this bond having been issued.

MR. HADSELL. Yes, that his property was released on account of this bond. That is what I am stipulating to, not as to the others.

MR. WISECARVER. And you will stipulate that the assignment that was taken in the name of G. Nelson was taken at the direction of your office as attorneys for the Fidelity & Casualty Company on account of their liability under that bond that is, that they paid the amount in order to get that bond back, and to present a cause of action on that assignment as evidenced by this suit.

MR. HADSELL. Yes, that is correct.

MR. WISECARVER. And also that the Fidelity & Casualty Company is the real party in interest in this suit, the name G. Nelson being used merely as an assignee for purposes of collection.

MR. HADSELL. That is correct.

MR. WISECARVER. I think that is all, your Honor."

The foregoing having been incorporated into the record, plaintiff rested.

MR. WISECARVER. At this time we wish to make a motion for a nonsuit upon the ground that there has been no proof showing that the plaintiff is entitled to recover any amount from this defendant in this action, that there is no competent evidence before the Court showing that the plaintiff is entitled to a judgment in any amount against the defendant.

THE COURT. Motion denied; exception noted.

[83]

LOU HARRY SILBERMAN,

called for the defendant, then testified:

Direct Examination.

By Mr. WISECARVER:

I am in the salvage business. During the year 1926 I was vice president of the San Francisco Iron & Metal Company, and at that time met N. Abrahams. I had business dealings with him approximately some time in November, 1926, I don't know the exact date.

Q. What was the character of the business relationship you had with him at that time?

THE COURT. With whom?

MR. WISECARVER. N. Abraham.

MR. HADSELL. I object to the question, if Your Honor please, as entirely outside of the issues

(Testimony of Lou Harry Silberman.)

in this case, as immaterial, irrelevant and incompetent.

THE COURT. Overruled, and an exception.

MR. SILBERMAN. Well, I entered into a partnership with him on behalf of the San Francisco Iron & Metal Company. I was vice president of that company.

MR. HADSELL. Just a moment. May it be understood that my objection goes to all this line of questions to this witness.

THE COURT. Yes, and that the objection is overruled and an exception is entered.

MR. SILBERMAN. I do not remember whether the partnership was in writing or not. I could not swear positively but I do not think it was.

MR. HADSELL. If that was in writing we would like to have it before he testifies about it.

THE COURT. Was it in writing?

A. I do not think it was. It has been a long time, I am [84] not positive of it.

Q. If it was in writing, where is the writing?

A. I am sure I don't know.

THE COURT. Objection overruled; an exception.

MR. SILBERMAN. The partnership was composed of the assets of N. Abraham Mercantile Company and the moneys which I put in for the San Francisco Iron & Metal Company.

Q. Approximately how much did you put in for the San Francisco Iron & Metal Company?

(Testimony of Lou Harry Silberman.)

MR. HADSELL. The same objection, if your Honor please, immaterial, irrelevant and incompetent.

THE COURT. Objection overruled; an exception.

MR. SILBERMAN. The San Francisco Iron & Metal Company put in from $60,000.00 to $70,000.00. The assets of Mr. Abraham were approximately $50,000.00.

MR. WISECARVER. Q. Among other assets of the N. Abraham Mercantile Company that were contributed by Mr. Abraham was there included property that formed the subject-matter of the suit known as Berges v. N. Abraham and others, that is, for the steel rails that were sold to the Abraham Mercantile Company?

MR. HADSELL. I object to that on the same ground.

THE COURT. Overruled; an exception.

MR. SILBERMAN. The steel rails were part of the assets of N. Abraham Company and those assets were included as assets of the partnership. N. Abraham Mercantile Company was a trade name of N. Abraham.

Q. Were there any liabilities of N. Abraham that were assumed on behalf of the San Francisco Iron & Metal Company in forming that partnership?

MR. HADSELL. The same objection, if your Honor please. [85]

(Testimony of Lou Harry Silberman.)

THE COURT. The same ruling; an exception.

A. There were no liabilities.

MR. WISECARVER. When did you dissolve the partnership?

A. In November 1927.

Q. At the time of the dissolution of the partnership did you or did the San Francisco Iron & Metal Company assume to pay the debts of the partnership?

MR. HADSELL. The same objection, if your Honor please, immaterial, irrelevant and incompetent in this case, by virtue of the judgment in Berges v. Abraham.

THE COURT. You claim all of these transactions between these people were not in writing?

MR. WISECARVER. I have not been able to find any writings.

THE COURT. Overruled; an exception.

MR. SILBERMAN. The partnership assumed all of the indebtedness when it was merged with the corporation. It did not assume to pay any of the antecedent personal debts of N. Abraham nor did the San Francisco Iron & Metal Company assume to pay any of those debts.

Cross-Examination.

By MR. HADSELL:

MR. HADSELL. I understand my objection has run to this whole line of testimony, if your Honor please.

(Testimony of Lou Harry Silberman.)

THE COURT. Yes.

MR. SILBERMAN. The partnership consisted of N. Abraham and myself acting for the San Francisco Iron & Metal Company. As I understood it the San Francisco Iron & Metal Company was one of the partners in this arrangement, and at the time of the formation of this partnership the N. Abraham Mercantile Company then had on hand the steel rails that had been bought from the Goodyear Redwood [86] Lumber Company. At that time N. Abraham, doing business under the name of N. Abraham Mercantile Company, had those steel rails on hand. They were on hand when I came back from the East. We had not made any arrangements as to a partnership. I had been dealing with N. Abraham before this but I had no interest in the N. Abraham Mercantile Company. The partnership was formed in November of 1926 and I had been East just before that. When I came back I got into a discussion with N. Abraham and the steel rails were on hand at that time. I did not know where they came from, but I learned where they came from. He told me where they had come from. I went over whatever assets he had and I found those rails were among the assets. Also among the assets were a lot of army goods, tents, cots, mattresses, and these were taken over.

He had on hand some uncollected accounts and I went over those with him and those were taken over too, and subsequently I think the partnership col-

(Testimony of Lou Harry Silberman.)

lected some of those unpaid accounts. The San Francisco Iron & Metal Company had certain assets that went into the partnership. The San Francisco Iron & Metal Company put into this partnership $60,000.00 or $70,000.00 in cash.

According to the accounts of N. Abraham Company he owed no debts. That is what he said at that time. We took over all the assets of N. Abraham and that included the book accounts. I really don't know when I first heard of the Goodyear Redwood Lumber Company claim. I remember that we were sued on it. I don't know whether I testified as a witness in that case. I know that I had a deposition taken. I don't remember going to court and testifying.

The San Francisco Iron & Metal Company participated in no profits of this arrangement. There were no profits. It did participate in paying liabilities of the partnership. Outside of [87] the Goodyear Redwood Lumber Company, the San Francisco Iron & Metal Company paid various liabilities of the partnership; the amount I could not say. I can't say now whether their loss was $60,000.00 or $70,000.00 in all or that $60,000.00 or $70,000.00 was paid before they took care of the loss of the partnership. The money which the San Francisco Iron & Metal Company put up was put up at different times, and the business was operated at a loss, requiring that they put up more money to take care of

(Testimony of Lou Harry Silberman.)

the bills. Finally, the San Francisco Iron & Metal Company went into bankruptcy. I do not think the bankruptcy was due to its participation in this joint venture. At least, not entirely. I don't know whether it had anything to do with this venture at all.

There were two Silbermans, H. Silberman, Sr., and H. Silberman, Jr.; H. Silverman, Sr. was not concerned in the matter. I think the suit was brought against H. Silberman, Jr. who worked for N. Abraham Company. He did not have any investment in this venture, but was a sort of manager for N. Abraham.

I lived in Los Angeles for a while in 1931; during the whole of 1931. My father and Thomas Nesbitt were the officers of the San Francisco Iron & Metal Company. I really don't know what became of the books of that company. I think the Receiver in Bankruptcy took them over. I think the partnership kept books but I was never able to get them. Mr. Abraham had a bookkeeper and an auditor that had charge of the books; I don't know their names and I don't know where they are or what has become of them.

I saw some of the books but I never saw them all because the auditor lived in Oakland; she was a lady; and she did not work at the Abraham Company at all times but she kept the books in Oakland most of the time. I think that is where she told me that she kept them. The principal place of business of the

(Testimony of Lou Harry Silberman.)

partnership [88] was 599 Brannan Street, San Francisco.

Before I went into this arrangement I had known Mr. Abraham for several years. He was engaged in the army goods business. I did not know anything about his business before going into it with him. My brother went to work for him, that is how I got interested in it for the San Francisco Iron & Metal Company. I knew Mr. Abraham was in this business for five or six years here in San Francisco and it was a considerable business. As to the investigation I made before I went into this arrangement with him, I went over what was supposed to be his books and went over his stock and that is the only investigation I made. As to what books I did go over, they were supposed to be the books of N. Abraham Mercantile Company. I do not remember what books they were but I think I went over all of them. He had some loose bills there but he was discounting the bills.

Abraham told me that the steel rails belonged to N. Abraham Mercantile Company.

I saw the books that were opened on behalf of this partnership but I did not have anything to do with directing the opening of these books; that was left to Abraham and my brother; that is about it. As to whether my brother continued to participate in this after the partnership deal was formed, he was there all the time. I think he was there five or six

(Testimony of Lou Harry Silberman.)

months before the partnership deal was formed. He was buying and selling merchandise. I think he had access to the books of the Abraham Mercantile Company. He told me about the claim of the Goodyear Redwood Lumber Company after the claim was made; he just told me there was a claim of the Goodyear Redwood Lumber Company. As to what I did about it with Abraham, well, I don't remember, I really think that Abraham said he would take care of it, but I really don't know, it [89] is quite a while ago. I refreshed myself yesterday; I read over the deposition that was taken to refresh my memory; it is quite a while ago this happened, and I have been through a lot of things since, and this matter has not bothered me much. I have been much worried about other things.

I can't give you the exact date of this arrangement with Abraham, it was some time in November 1926. At that time I went over the books and papers, and as to finding current bills on hand I did find some small bills yes. I really don't know whether those small bills were paid by the partnership or not. I think Mr. Abraham took care of those personal bills himself. I really would not say but I know they were taken care of.

I talked this deal over with my brother Harry before I went into it, but he never told me that he was engaged in purchasing or had purchased these steel rails in Mendocino County from the Goodyear

(Testimony of Lou Harry Silberman.)

Redwood Lumber Company, nor that he was having them shipped down, and as to whether he mentioned Mendocino County to me at all I don't think he did, it has been so long ago I would not say he did or did not, but I don't remember that he did. In fact, when I went East there were no rails, and when I came back there were rails. Before I went East I had gone down to N. Abraham & Company and had looked it over. I was very much pleased that Mr. Abraham had taken my brother in and was giving him a position. I had done business with Abraham but we did not have anything definite about going into a partnership agreement. I think I was in the East from September until November. As to whether it was part of my brother's duties to buy such things as steel rails and merchandise that Abraham was buying, I really don't know what he was doing before the partnership; all I knew he was down there at his place. I know that after I went into [90] the partnership his duties were buying and selling, and I don't know what his job was before that. He had been with N. Abraham four or five months, or maybe longer. Yes, I had been down there many times but it was not my business to talk to Harry about somebody else's affairs. The only thing I was interested in, I was much pleased that Abraham had given him a job. I have no knowledge of ever seeing any correspondence between Goodyear Redwood Lumber Company and Abraham or Harry Silberman, and I

(Testimony of Lou Harry Silberman.)

do not know of ever having any correspondence myself with the Goodyear Redwood Lumber Company about this claim.

Redirect Examination.

By Mr. WISECARVER:

MR. WISECARVER: Q. Mr. Silberman, a question was asked you by counsel, I believe it was in this form, aside from this obligation to the Goodyear Redwood Lumber Company was there any obligation that you paid for the partnership, and I will ask you if you paid those obligations for that partnership, or if you have paid this Goodyear obligation at all.

A. No, I don't think I did.

Q. If I understand your testimony correctly a few minutes ago you said in the dissolution of your partnership that the San Francisco Iron & Metal Company agreed to pay the obligation of the partnership, is that correct?

A. I did.

Q. Did you agree to pay any of the antecedent debts of Abraham prior to the formation of the partnership of November 1, 1926?

MR. HADSELL: I again object on the ground it calls for the conclusion of the witness.

THE COURT: Overruled; an exception. [91]

A. No, we did not assume any obligations that were prior.

(Testimony of Lou Harry Silberman.)

MR. WISECARVER: I think that is all.

MR. HADSELL: That is all.

MR. WISECARVER: That is satisfactory except of course, I make objection to the introduction of any of the judgment roll in this case except the judgment not pleaded.

THE COURT: You have already made that objection.

MR. WISECARVER: I do not want it to be construed that we have by this stipulation waived the objection. I wish also at this time to make a motion for judgment and findings.

MR. HADSELL: We do the same on behalf of the plaintiff, for the full amount, and request findings.

Thereafter, the case was orally argued before the court and was submitted upon written briefs. Thereafter and on June 1, 1934, and outside the presence of the parties, the Court made and entered its order granting judgment to the plaintiff with findings to be submitted. Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff.

Thereafter and on June 16, 1934 the Court, with-

out the presence of the parties, signed the proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the Court, and judgment was entered on said June 16, 1934.

That all of the material evidence for determination of this cause has been set forth herein, as well as all proceedings on the trial thereof. That prior to the trial the respective par- [92] ties, by stipulation in writing as provided by law, had duly waived trial by jury.

That this bill of exceptions has been prepared and has been duly settled and allowed and engrossed within the time prescribed by law.

WHEREFORE, the foregoing is hereby settled and allowed as the bill of exceptions in the above entitled action.

Dated: Sept. 4th, 1934.

FRANK H. KERRIGAN,
United State District Judge.

[Endorsed]: Approved. HADSELL, SWEET, INGALLS & LAMB, by D. HADSELL.

[Endorsed]: Filed Sept. 4, 1934. [93]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Frank H. Kerrigan, Judge of the United States District Court:

The above named defendant Century Indemnity

Company, conceiving itself aggrieved by the judgment made and entered on the 16th day of June, 1934, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United State Circuit Court of Appeals for the Ninth Circuit, and that a citation may be issued under the rules of such court in such case made and provided.

And your petitioner further prays that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Circuit Court of Appeals, and that the proper order relating to and fixing the [94] amount of security as supersedeas and for costs be made.

DATED: San Francisco, California, August 13th, 1934.

CENTURY INDEMNITY COMPANY,
Defendant.

JEWELL ALEXANDER
WM. C. BACON
R. P. WISECARVER
REDMAN, ALEXANDER & BACON
Attorneys for Defendant.

Receipt of copy of the within petition for appeal admitted this 13th day of August, 1934.

D. HADSELL
JOE G. SWEET
EVERETT A. INGALLS
R. F. LAMB
HADSELL, SWEET, INGALLS & LAMB

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 13, 1934. [95]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, The Century Indemnity Company, a corporation, by and through its attorneys, and in support of its petition for appeal says that in the record, proceedings, findings, opinion and in the final decree and judgment in this cause entered on June 16, 1934, manifest and material error has intervened to the prejudice of this defendant and appellant, to-wit:

1. That the United States District Court, for the Northern District of California, erred in denying the motion of this defendant and appellant for a non-suit.

2. That said court erred in failing and refusing to find that the plaintiff and defendant were not co-sureties.

3. That said court erred in failing and refusing to find that the plaintiff was not entitled to contribution from the defendant.

4. That said court erred in failing and refusing to find that plaintiff was not entitled to reimbursement from [96] defendant.

5. That said court erred in failing and refusing to find that the plaintiff is entitled under the pleadings to recover only by way of contribution or reimbursement and no more.

6. That said court erred in failing and refusing to find that plaintiff was not entitled to recover as an assignee of the judgment creditor.

7. That said court erred in admitting into the record as evidence, over the objection of this defendant, the findings of fact and particularly Finding "IVa" of said findings of fact in the judgment roll in the case of Berges vs. Abraham, et al.

8. That said court erred in failing and refusing to find that finding IVa in the findings of fact in the case of Berges vs. Abraham, et al was not res adjudicata as between the defendants in said action and is not res adjudicata between the parties to the present action.

9. That the said court erred in failing and refusing to find that the Fidelity and Casualty Company of New York is the real party plaintiff and that plaintiff is entitled to recover in this connection only the amount which the Fidelity and Casualty

Company of New York is entitled to recover by way of contribution or reimbursement.

10. That the said court erred in failing and refusing to find in accordance with the special findings and conclusions of law submitted by this defendant.

11. That the said court erred in failing and refusing to find that the payment for the judgment in the case of Berges vs. Abraham, et al. made by plaintiff G. Nelson was pur- [97] suant to and in fulfillment of the obligation of the Fidelity and Casualty Company of New York to pay said judgment under its bond and undertaking for release of attachment issued for N. Abraham, a judgment debtor in said action.

12. That the said court erred in failing and refusing to find that plaintiff is entitled to recover under her assignment of the judgment in Berges vs. Abraham, et al. only the amount which N. Abraham is entitled to recover against his joint debtors only, and was not entitled to recover against defendant, who is the surety of one of the other joint debtors under a release of attachment bond issued by it for one of those joint debtors.

13. That the said court erred in failing and refusing to find that The Century Indemnity Company and the Fidelity and Casualty Company of New York were not sureties of the same principal nor for the same obligation and that neither L. Silberman, San Francisco Iron & Metal Company nor The Century Indemnity Company were a principal or

principals under the bond and undertaking of Fidelity and Casualty Company of New York given to release an attachment against N. Abraham in the case of Berges vs. Abraham, et al.

14. That the said court erred in failing and refusing to find that the debt which formed the subject matter of the judgment in the action of Berges vs. Abraham, et al. was incurred by N. Abraham personally prior to his partnership with L. Silberman and San Francisco Iron & Metal Company, a corporation, that is prior to November 1, 1926, and that said partnership was dissolved on December 1, 1927, and that at the time of said dissolution it was not agreed that the San Francisco Iron & Metal Company would pay any of the antecedent [98] personal debts of N. Abraham contracted prior to November, 1, 1926, including the debt sued on herein, and that it is not true that the said San Francisco Iron & Metal Company agreed to save harmless the said N. Abraham of and from his obligation to pay said antecedent debt, including the debt sued on herein, and that finding IVa of the findings of fact in said action of Berges vs. Abraham, et al., to the effect that the said San Francisco Iron & Metal Company agreed to pay the said debt, which formed the subject matter of said action, was not an issue between the plaintiff and defendants in said action, and concerned only the defendants in said action, and the judgment in said action is not in accord with said finding, but is contrary to said finding, and said

finding is not admissible as evidence in this case.

15. That the said court erred in failing and refusing to find and to enter judgment accordingly that the plaintiff is not entitled either to contribution or reimbursement from the defendant, and that defendant is entitled to judgment against plaintiff for its costs.

16. That the said court erred in failing and refusing to find that this defendant was released of all liability under its release of attachment bond issued by L. Silberman and San Francisco Iron & Metal Company in the case of Berges vs. Abraham, et al., when said judgment was paid by plaintiff acting for and in behalf of Fideltiy and Casualty Company of New York, a surety of one of the joint debtors in said judgment.

17. That the said court erred in drawing from its special findings the following conclusion of Law:

> "That judgment should be entered in favor of the plaintiff and against the defendant in the sum of $6,000.00, together with interest thereon at the [99] legal rate of seven per cent per annum from the date of the commencement of this action, to-wit, September 24, 1931, together with plaintiff's costs of suit incurred herein."

18. That the said court erred in drawing from its special findings the following conclusion of law:

> "That upon the satisfaction of said judgment the clerk of this court should deliver to the

defendant the assignment by plaintiff to defendant of claim of plaintiff against the San Francisco Iron & Metal Company, a corporation, in bankruptcy."

19. That the judgment is contrary to law in this, that it adjudges in effect that the plaintiff can recover as and for an assignment of the judgment, whereas her sole right of recovery is for contribution or reimbursement and not as assignee of the judgment.

20. That the said court erred in failing and refusing to find that there is only a ratable contribution in equal proportions between the joint judgment debtors in the judgment in the case of Berges vs. Abraham, et al., and that the parties hereto cannot have a higher rate of contribution.

21. That the said court erred in finding that the San Francisco Iron & Metal Company agreed to pay the debt which formed the subject matter of the judgment sued on, in that there is no evidence to support said finding and it is contrary to the evidence.

22. That the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact.

23. That the judgment is contrary to law in that it is contrary to the evidence. [100]

24. That the said court erred in failing and refusing to find that the judgment in the case of

Berges vs. Abraham, et al. was not in accord with and was contrary to finding number IVa in the case of Berges vs. Abraham, et al.

25. That the said court erred in ordering, rendering and in entering final judgment herein on June 16, 1934.

26. That the said court erred generally in refusing to order judgment in favor of this defendant and against plaintiff.

27. That the said court erred in ordering judgment for plaintiff for any sum at all.

28. That the said court erred in refusing to order judgment for the defendant upon the evidence in the cause.

WHEREFORE, said defendant prays that findings, decree and judgment be reversed and that an order be entered reversing the decree and judgment of the lower court in said cause and that said court be directed to render and enter a judgment and decree in favor of said defendant.

JEWEL ALEXANDER
WM. C. BACON
REDMAN, ALEXANDER & BACON
R. P. WISECARVER
Attorneys for Defendant
The CENTURY INDEMNITY COMPANY.

[Endorsed]: Service of the within Assignment

of Errors admitted this 13th day of August, 1934.

HADSELL, SWEET, INGALLS & LAMB

Attorney for Plaintiff

[Endorsed]: Filed Aug. 13, 1934. [101]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of the attorneys for the above-named defendant and petitioner for appeal, and upon filing the petition of said defendant for appeal;

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein on the 16th day of June, 1934, in favor of plaintiff and against said defendant in the sum of $6,000.00, with interests at 7% per annum from September 24, 1931, and costs, and that the amount of the bond as required by law on said appeal be and the same is hereby fixed at the sum of $10,000.00, and said bond shall be conditioned that appellant will prosecute its said appeal to effect, and satisfy the judgment against it and answer all damages and costs if it fail to make its appeal good, and said bond shall act as a supersedeas and cost bond, and execution shall be stayed pending the outcome of said appeal.

DATED: August 13th, 1934.

FRANK H. KERRIGAN,
United States District Judge.

Amount of bond at $10,000.00 O. K. D. HADSELL.

[Endorsed]: Service of the within Order allowing appeal admitted this 13th day of_____ 192____

HADSELL, SWEET, INGALLS & LAMB,
Attorney__ for plaintiff.

[Endorsed]: Filed Aug. 13, 1934. [102]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, The Century Indemnity Company, a corporation, as principal, and Continental Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of Indiana, and duly authorized to transact business and issue surety bonds in the State of California, as surety, are held and firmly bound unto G. Nelson in the sum of ten thousand dollars ($10,000.00), to be paid to the said G. Nelson, her heirs, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seal and dated this 13th day of August, 1934.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California, in a suit pending

in said court between G. Nelson, plaintiff, and Century Indemnity Company, a corporation, defendant, a judgment was rendered against said defendant on the 16th day of June 1934, for the sum of $6000.00, together with interest thereon in the amount of 7% per annum from September 24, 1931, and costs; and [103]

WHEREAS, the said defendant The Century Indemnity Company, having obtained from said court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said G. Nelson staying and admonishing her to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days from the date of such citation;

NOW, THEREFORE, the condition of this obligation is such that if the said defendant The Century Indemnity Company shall prosecute its said appeal to effect and satisfy the judgment against it, and answer all damages and costs if it fail to make its appeal good, then the above obligation shall be void; otherwise to remain in full force and effect.

And further, the undersigned surety agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to the undersigned Continental Casualty Company of not less

than ten days, proceed summarily in the above entitled cause to ascertain the amount which said Continental Casualty Company is bound to pay on account of such breach, and render judgment therefor against it and award execution thereof, not exceeding, however, the sum specified in this undertaking.

THE CENTURY INDEMNITY COMPANY,
(Seal) By H. F. Mills.
CONTINENTAL CASUALTY COMPANY,
(Seal) By B. F. Cator, Attorney in fact.

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: August 13th, 1934.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Service of the within Bond on Appeals admitted this 13th day of August, 1934.

HADSELL, SWEET, INGALLS & LAMB,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 13, 1934. [104]

[Title of Court and Cause.]

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above entitled Court:

You are hereby requested to prepare a transcript of record in the above entitled action to be filed in the United States Circuit Court of Appeals, for the Ninth Circuit, pursuant to an appeal heretofore allowed in the above entitled action, and to include in said transcript of record the following:

1. Plaintiff's complaint.
2. Defendant's answer to complaint.
3. Defendant's proposed special findings and conclusions of law.
4. Minute Order of the Court ordering judgment for plaintiff, dated June 1, 1934.
5. Special findings and conclusions of law.
6. Judgment.
7. Defendant's petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit.
8. Defendant's assignment of errors.
9. Order allowing appeal and fixing amount of bond on appeal [105]
10. Bond on appeal.
11. This praecipe.
12. Citations to the plaintiff to appear on appeal.
13. Bill of Exceptions.
14. Stipulation waiving trial by jury.

Dated: San Francisco, California, August 31, 1934.

JEWEL ALEXANDER
WILLIAM C. BACON

REDMAN, ALEXANDER &
BACON
R. P. WISECARVER
Attorneys for Defendant and
Appellant

Receipt of a copy of the within praecipe for record on appeal is hereby admitted this 31st day of August, 1934.

HADSELL, SWEET, INGALLS
& LAMB
By D. Hadsell
Attorneys for Plaintiff and
Respondent

[Endorsed]: Filed Sept. 4, 1934. [106]

District Court of the United States, Northern District of California.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 106 pages, numbered from 1 to 106, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of G. NELSON, vs. THE CENTURY INDEMNITY COMPANY, No. 19086-K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of $22.95 and that the said amount has been paid to me by the Attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A. D. 1934.

(Seal) WALTER B. MALING,
Clerk.
By J. P. Welsh, Deputy Clerk.

[107]

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO G. NELSON, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein THE CENTURY INDEMNITY COMPANY is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 13th day of August, A. D. 1934.

FRANK H. KERRIGAN,
United States District Judge.

Received copy of within Citation on Appeal this 13th day of August, 1934.

HADSELL, SWEET, INGALLS & LAMB
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 14, 1934. [108]

[Docketed]: No. 7618. United States Circuit Court of Appeals for the Ninth Circuit. The Century Indemnity Company, a corporation, Appellant, vs. G. Nelson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 26, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7618

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CENTURY INDEMNITY CO., a Corp.,
Appellant,

vs.

G. NELSON,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, May 27, 1935.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

ORDER OF SUBMISSION.

Ordered appeal in above cause argued by Mr. R. P. Wisecarver, counsel for appellant, and by Mr. D. Hadsell, counsel for appellee, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, June 22, 1936.

OPINION

Before: GARRECHT and DENMAN, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

WILBUR, Circuit Judge:

This is the second appeal in this case. We refer to the opinion on the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765, for a statement of facts. The former appeal was taken by G. Nelson from a judgment that she take nothing. This appeal is by her opponent the Century Indemnity Company, which will hereafter be referred to as the "Indemnity Company", from a judgment in favor of G. Nelson for the full amount claimed. G. Nelson, appellee, is suing the Indemnity Company, appellant, as assignee of a judgment rendered against that company in an attachment suit, No. 204668, commenced by V. Berges in the Superior Court of California in San Francisco, against N. Abraham, H. Silverman, L. Silverman, doing business under the name of N. Abraham Mercantile Company, and the San Francisco Iron & Metal Company. (Silverman and Silberman are stipulated to be one and the same.)

On the first trial the Indemnity Company, which had executed a release of attachment bond on behalf of the San Francisco Iron & Metal Company, H. Silberman and L. Silberman, defeated recovery by G. Nelson on the judgment in action No. 204668,

supra, assigned to her upon the ground that she was trustee for the Fidelity and Casualty Company, hereinafter referred to as the "Fidelity Company", which had executed a similar bond on behalf of N. Abraham for the release of his property attached. The Fidelity Company had advanced the money to G. Nelson to purchase the judgment. Upon this basis the Indemnity Company claimed that the superior court judgment (in action No. 204668) had been paid by the Fidelity Company for N. Abraham, one of the judgment debtors. It will be observed that in the first trial the Indemnity Company relied upon the interrelationship between the parties as disclosed by the judgment roll and by the bonds given in action No. 204668. Now, the position of the parties being reversed, the Indemnity Company claims that the findings and the judgment in the superior court action No. 204668 do not correctly show that interrelationship. It now claims that N. Abraham as between the defendants was in fact the principal and only debtor, and that his surety, the Fidelity Company, having paid the debt, the Indemnity Company has no further responsibility therefor on account of the release bond given by it.

Before discussing appellant's claims of error some procedural questions should be first considered. Many of the Indemnity Company's assignments of error, and five of the seven specifications of error in its brief, are based upon the failure of the trial court to make certain special findings requested by the Indemnity Company. These as-

signments and specifications cannot be considered because the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial. Continental Nat'l Bk. v. Nat'l City Bk. of N. Y., 69 F. (2d) 312, 317, and cases therein cited.

There remain two other specifications of error, 1 and 4, to be considered, which are as follows:

"1. The court erred in that the judgment is contrary to the law of the case established on the first appeal which provides that recovery can be had only for contribution or reimbursement and no more.

"4. The court erred in admitting in evidence the pleadings and findings of fact in the prior case of Berges v. Abraham containing a collateral finding of fact that San Francisco Iron & Metal Company had agreed with N. Abraham to pay that particular debt which formed the basis of the judgment in the case of Berges v. Abraham and holding the defendant, Century Indemnity Company, was also bound thereby."

The fourth specification of error, supra, is predicated upon assignments of error Nos. 7 and 8, which are as follows:

"7. That said court erred in admitting into the record as evidence, over the objection of this defendant, the findings of fact and particularly finding 'IV' of said findings of fact in the judgment roll in the case of Berges v. Abraham, et al.

"8. That said court erred in failing and refusing to find that finding IV in the findings of fact in the case of Berges v. Abraham, et al, was not res adjudicata as between the defendants in said action and is not res adjudicata between the parties to the present action."

The eighth assignment of error is based upon refusal of the trial court to make certain findings requested by the Indemnity Company, as we have already pointed out. This request came too late and need not be considered.

Assignment No. 7 fails to conform to our rule 11 with reference to assignments of error in the admission of evidence, because it does not "quote the full substance of the evidence admitted or rejected". United States v. Nat'l Bk. of Commerce of Seattle, 73 F.(2d) 721; Fidelity & Deposit Co. of Maryland v. Lindholm, 66 F.(2d) 56. Neither does it state the objection made by the defendant nor an exception taken, as required by the rule. Goldstein v. United States, 73 F.(2d) 804.

Specification of error No. 4 also violates our rule 24 in two particulars. It does not set forth separately and particularly each error asserted and intended to be urged. Two errors are specified; one, the admission of certain evidence, and, two, deciding that the appellant is bound thereby. The rule also provides: "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." The specification

does not set out the full substance of the evidence received.

Therefore, specification 4, and assignments 7 and 8, upon which it is based, violate our rules and need not be considered.

This leaves for consideration specification of error No. 1. *This specification is based upon assignments* of error numbered 1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 15, 17, 19, 20, 22, 23, 25, 26, 27 and 28. Most of these assignments specify the refusal of the trial court to make certain findings of fact requested by the Indemnity Company. These assignments, as we have stated, cannot be considered because the requests therefor were made too late. This is true in the case of the following assignments: 2, 3, 4, 5, 6, 9, 10, 11, 13, 15 and 20. Of the other assignments referred to by appellant in support of this specification of error, Nos. 17, 23, 25, 26, 27 and 28 are too general to be considered. Virginia Ry. Co. v. Chambers, 46 F. (2d) 20; U. S. Shipping Board E. F. Corp. v. Drew, 288 F. 374; Columbia Pictures Corp. v. Lawton-Byrns, 73 F.(2d) 18. Assignment No. 22 is "that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact". This assignment is not only too general, but it embraces three different assignments of error contrary to our rule 11. The alleged errors embraced in this assignment are as follows: First, "that the judgment is contrary to law * * * ". This cannot be considered because too general. Washburn v. Douthit, 73 F.(2d) 23. This assignment is also too general and is not based upon any

ruling of the court pointed out in the specification. Hecht v. Alfaro, 10 F. (2d) 464. Third, "nor is it supported by findings of fact". This latter assignment, if entirely separate from the other two, would be a proper assignment to challenge the sufficiency of the findings of fact to support the judgment. Assignment 22 need not be considered because it violates the rule requiring assignments of error to "set out separately and particularly each error asserted and intended to be urged".

Assignments of error No. 1 and 19 are yet to be considered.

Assignment No. 1 assigns as error the denial of appellant's motion for nonsuit. The appellant proceeded after the ruling to offer its testimony and thus waived any error in the ruling. Bogh v. Gassert, 149 U. S. 17; Maryland Casualty Co. v. Jones, 35 F.(2d) 791; United States v. Alberby, 63 F.(2d) 965.

Assignment No. 19 is "that the judgment is contrary to law in this, that it adjudges in effect that the plaintiff can recover as and for an assignment of the judgment, whereas her sole right of recovery is for contribution or reimbursement and not as assignee of the judgment". This assignment does not point out a ruling of the trial court on any proposition of law or fact claimed to be erroneous. If the appellant desired a ruling of the trial court upon a proposition of law involved in the case not arising from the rulings upon the introduction or rejection of evidence, or the overruling of its motions or demurrers, it should have formulated its

proposition of law and have requested a ruling thereon. Hecht v. Alfaro, 10 F.(2d) 464, supra. The basic difficulty in the presentation of this appeal is the assumption by the Century Indemnity Company that it could raise its various contentions by requests for findings of fact made after the trial was concluded.

It is exceedingly unsatisfactory to dispose of this case solely because of failure of the parties to comply with the rules pertaining to the assignments of error and specifications of error. We therefore add the following observations with reference thereto: An assignment of error must be based upon an error which actually occurred in the trial of the case. If no error occurred there is no basis for the assignment. Gartner v. Hays, 272 F. 896. Here, as we have said, the failure to make findings requested after the trial was not an error during the course of the trial and is not reviewable.

Specifications of error stand upon a different footing, being required by rule of this court and by the rules of most appellate courts for convenience of the court and for greater certainty in the presentation and disposition of cases on appeal. For that reason we have been more liberal in dealing with the matter of specifications of error in the brief than in dealing with assignments of error in the record. A violation of our rule, however, justifies the court in refusing to consider the specifications which violate the rule.

On the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765, supra, we held that if the San

Francisco Iron & Metal Company had assumed the debt due from its co-defendants and joint judgment debtors as found by the superior court of the state in its findings of fact in action No. 204668, and if the value of the property of the San Francisco Iron & Metal Company released from attachment in that action by virtue of the bond of the Indemnity Company given therein, and herein sued upon, equalled or exceeded the amount due on the judgment secured by V. Berges in action 204668, then, in that event, G. Nelson was entitled to recover the full amount furnished to her by the Fidelity Company and in turn paid by her to Berges for the assignment of the judgment and bond of the Indemnity Company.

The trial court found on the retrial that the value of the property of the San Francisco Iron & Metal Company released from attachment by the Indemnity Company's bond was over $6,000, thus exceeding the amount of the judgment secured by V. Berges in action 204668.

It might be urged that its findings of fact with relation to whether or not the San Francisco Iron & Metal Company has assumed to pay the debt of N. Abraham, was not a finding of the ultimate fact involved because the court in its findings merely quoted the findings of the superior court of the state without in express terms adopting them as it own. (See footnote 1.) However, the appellant does not

(Footnote 1):

XII. That in said action entitled V. Berges v. San Francisco Iron and Metal Company which is

attack these findings on the ground that they are of probative rather than ultimate facts. On the contrary, in its assignment No. 21 it urges "that the said court erred in finding that the San Francisco Iron & Metal Company agreed to pay the debt which formed the subject matter of the judgment sued on, in that there is no evidence to support said finding and it is contrary to the evidence". This

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mentioned in paragraph II of these findings, the plaintiff alleged by amendment to her complaint, and the defendants H. Silberman, L. Silberman and San Francisco Iron & Metal Company, a corporation, in answer to said amendment to the complaint denied, as follows:

"That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, H. Silberman, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. Abraham Mercantile Company; that about October, 1927, defendant San Francisco Iron & Metal Company received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the payment of the claim and matters herein sued for, but that said defendant San Francisco Iron & Metal Company has wholly failed to do."

XIII. That thereafter the court in said action after the trial thereof made and entered its findings of fact:

"That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San

assignment of error shows that instead of claiming that the court found the probative facts rather than the ultimate facts with relation to the agreement of

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Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company; that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considerations specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

XIV. That the terms of said judgment so rendered in said action are as follows:

"This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the court made and filed its findings of fact and conclusions of law. Pursuant thereto, It is hereby ordered, adjudged and decreed:

"(1) That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, the sum of five thousand six hundred forty-three and 65/100 ($5,643.65) dollars, together with her costs of action taxed at $69.90.

"(2) That the defendants take nothing by reason of their counter claim and cross-complaint.

"Dated: October 10, 1929."

the San Francisco Iron & Metal Company, the appellant is relying upon the alleged failure of the evidence to support the finding of this ultimate fact. In view of the findings, first, that the value of the property released by the Indemnity Company's bond amounted to $6,000, second, that the San Francisco Iron & Metal Company had assumed and agreed to pay the debt of N. Abraham, it follows from our decision on the former appeal that the judgment of the trial court is correct.

During the trial of this action the parties submitted the case upon all the testimony introduced at the former trial and upon other evidence then adduced. The Indemnity Company objected to the introduction of the judgment roll in action No. 204668. The objection was not well taken. Introduction of the judgment roll was the proper way to prove the judgment. Fennell v. United States, 67 F.(2d) 768; McLinley Bros. v. McCauley, 9 P. (2d) 298; Terry v. Gibson, 128 P. 1126. What the appellant seeks to raise is the question of the probative effect of the findings and judgment therein (No. 204668) upon the defendants therein and upon their sureties in privity with them in this action between such sureties. That question is a debatable one but is involved herein only as it affects the sufficiency of the evidence as a whole to support the judgment. Although the appellant moved for judgment, presumably upon the ground that the evidence would not support a judgment in favor of the plaintiff and appellee, it did not except to the ruling of the court denying the motion nor did it as-

sign such ruling as error. Assignments 25, 26, 27 and 28, (cited in footnote 2) do not refer to that ruling and are too general. The assignment should be, "The court erred in denying the defendant's motion for judgment". Furthermore, the appellant introduced a witness, L. Silberman, who was one of the copartners and codefendants in action No. 204668. He testified that the partnership which had purchased the steel rails from N. Abraham subsequently dissolved and that the San Francisco Iron & Metal Company assumed all indebtedness of the copartnership.

This evidence alone was sufficient to support the implied conclusion of the trial court that the San Francisco Iron & Metal Company had assumed the obligations of the copartners. It is clear that the judgment and findings in action No. 204668 are conclusive that "the indebtedness sued upon was that of the partnership. It is therefore of no importance whether the findings in the superior court No. 204668 relative to the assumption of the entire debt by the San Francisco Iron & Metal Company is conclusive upon the parties to the action. We may

(Footnote 2):

25. That the said court erred in ordering, rendering and in entering final judgment herein on June 16, 1934.

26. That the said court erred generally in refusing to order judgment in favor of this defendant and against plaintiff.

27. That the said court erred in ordering judgment for plaintiff for any sum at all.

28. That the said court erred in refusing to order judgment for the defendant upon the evidence in the cause.

assume as appellant contends that without additional evidence it is not. There is, therefore, no reason for relaxing our rule with reference to the specifications of error and there is no basis for relaxing the rule with reference to assignments of error as should be done only in case of a plain error unassigned (rule 11) and so clearly prejudicial as to result in injustice. In re Morgan, (C. C. A. 6) 26 F.(2d) 183; Mutual Life Ins. Co. v. Parkinson, (C. C. A. 6) 72 F.(2d) 759.

Judgment affirmed.

[Endorsed]: Opinion. Filed June 20, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7618.

THE CENTURY INDEMNITY CO., a Corp.,

Appellant.

vs.

G. NELSON,

Appellee.

JUDGMENT.

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Div., and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Jun. 22, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Monday, August 17, 1936.

Before: WILBUR, GARRECHT and DENMAN, Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING.

Upon consideration thereof and by direction of the court, it is ordered that the petition of appellant, filed July 20, 1936, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is granted.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Tuesday, November 24, 1936.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

ORDER OF SUBMISSION ON HEARING.

Ordered reargument in above cause presented by Mr. R. P. Wisecarver, counsel for appellant, and by Mr. Dan Hadsell, counsel for appellee, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Monday, June 7, 1937.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment be filed in said cause and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION AS AMENDED.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges. WILBUR, Circuit Judge:

This is the second appeal in this case. We refer to the opinion on the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765, for a statement of facts. The former appeal was taken by G. Nelson from a judgment that she take nothing. This appeal is by her opponent the Century Indemnity Company, which will hereafter be referred to as the "Indemnity Company", from a judgment in favor of G. Nelson for the full amount claimed.

On the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765 supra, we held that if the San Francisco Iron & Metal Company had assumed the debt due from its co-defendants and joint judgment debtors as found by the superior court of the state in its findings of fact in action No. 204668, and if the value of the property of the San Francisco Iron & Metal Company released from attachment in that action by virtue of the bond of the Indemnity Company given therein, and herein sued upon, equalled or exceeded the amount due on the judgment secured by V. Berges in action No. 204668, then, in that event, G. Nelson was entitled to recover the

full amount furnished to her by the Fidelity Company and in turn paid by her to Berges for the assignment of the judgment and bond of the Indemnity Company.

The trial court found on the retrial that the value of the property of the San Francisco Iron & Metal Company released from attachment by the Indemnity Company's bond was over $6,000, thus exceeding the amount of the judgment secured by V. Berges in action No. 204668.

G. Nelson, appellee, is suing the Indemnity Company; appellant, as assignee of a judgment rendered against that company in an attachment suit, No. 204668, commenced by V. Berges in the Superior Court of California in San Francisco, against N. Abraham, H. Silverman, L. Silverman, doing business under the name of N. Abraham Mercantile Company, and the San Francisco Iron & Metal Company. (Silverman and Silberman are stipulated to be one and the same.)

On the first trial the Indemnity Company, which had executed a release of attachment bond on behalf of the San Francisco Iron & Metal Company, H. Silberman and L. Silberman, defeated recovery by G. Nelson on the judgment in action No. 204668, supra, assigned to her upon the ground that she was trustee for the Fidelity and Casualty Company, hereinafter referred to as the "Fidelity Company", which had executed a similar bond on behalf of N. Abraham for the release of his property attached.

The Fidelity Company had advanced the money to G. Nelson to purchase the judgment. Upon this basis the Indemnity Company claimed that the superior court judgment (in action No. 204668) had been paid by the Fidelity Company for N. Abraham, one of the judgment debtors. It will be observed that in the first trial the Indemnity Company relied upon the interrelationship between the parties as disclosed by the judgment roll and by the bonds given in action No. 204668. Now, the position of the parties being reversed, the Indemnity Company claims that the findings and the judgment in the superior court action No. 204668 do not correctly show that interrelationship. It now claims that N. Abraham as between the defendants was in fact the principal and only debtor, and that his surety, the Fidelity Company, having paid the debt, the Indemnity Company has no further responsibility therefor on account of the release bond given by it.

Before discussing appellant's claims of error some procedural questions should be first considered. Many of the Indemnity Company's assignments of error, and five of the seven specifications of error in its brief, are based upon the failure of the trial court to make certain special findings requested by the Indemnity Company. These assignments and specifications cannot be considered because the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial. Continental Nat'l. Bk. v. Nat'l. City Bk. of N. Y.,

69 F.(2d) 312, 317, and cases therein cited. (Note 1.)

There remain two other specifications of error, 1 and 4, to be considered, which are as follows:

"1. The court erred in that the judgment is contrary to the law of the case established on the first appeal which provides that recovery can be had only for contribution or reimbursement and no more.

"4. The court erred in admitting in evidence the

(Note 1):

In the petition for rehearing the appellant, for the first time, contends that his request for special findings was timely although made after the court had decided the case and granted judgment to plaintiff. This contention is made upon the ground that under Rule 42 of the District Court from the Northern District of California the trial is still in progress until findings are rendered by the trial court. This rule (Rule 42 U. S. Dist. Court for the Northern District of California) is quoted at length in our decision written by Judge Denman, Lando v. Equitable Life Ins. Co. of U. S., 84 F.(2d) 640, and need not be repeated here in full. The rule provides that rendition of the decision or opinion shall be considered "as merely a preliminary order for judgment". This rule is evidently adopted to prevent the possibility that the "decision" or "opinion" should be deemed or taken as "findings of fact" on the one hand or as a "judgment" on the other hand, and thus to give to the successful party an opportunity thereafter to prepare special findings. The rule of the District Court is evidently not intended to extend the time of the trial so that requests for findings thereafter made should be considered as made during the trial. If the rule were construed as the appellant insists it should be, it would be beyond the power of the District Court for the trial is concluded when the decision is made.

pleadings and findings of fact in the prior case of Berges v. Abraham containing a collateral finding of fact that San Francisco Iron & Metal Company had agreed with N. Abraham to pay that particular debt which formed the basis of the judgment in the case of Berges v. Abraham and holding the defendant, Century Indemnity Company, was also bound thereby."

The fourth specification of error, supra, is predicated upon assignments of error Nos. 7 and 8, which are as follows:

"7. That said court erred in admitting into the record as evidence, over the objection of this defendant, the findings of fact and particularly finding 'IV' of said findings of fact in the judgment roll in the case of Berges v. Abraham, et al.

"8. That said court erred in failing and refusing to find that finding IV in the findings of fact in the case of Berges v. Abraham, et al., was not res adjudicata as between the defendants in said action and is not res adjudicata between the parties to the present action."

The eighth assignment of error is based upon refusal of the trial court to make certain findings requested by the Indemnity Company, as we have already pointed out, this request came too late and need not be considered.

Assignment No. 7 fails to conform to our Rule 11 with reference to assignments of error in the admission of evidence, because it does not "quote the full substance of the evidence admitted or rejected".

United States v. Nat'l Bk. of Commerce of Seattle, 73 F.(2d) 721; Fidelity & Deposit Co. of Maryland v. Lindholm, 66 F.(2d) 56. Neither does it state the objection made by the defendant nor an exception taken, as required by the rule. Goldstein v. United States, 73 F.(2d) 80.

Specification of error No. 4 also violates our rule 24 in two particulars. It does not set forth separately and particularly each error asserted and intended to be urged. Two errors are specified; one, the admission of certain evidence, and, two, deciding that the appellant is bound thereby. The rule also provides: "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." The specification does not set out the full substance of the evidence received.

Therefore, specification 4 and assignments 7 and 8, upon which it is based, violate our rules and need not be considered.

This leaves for consideration specification of error No. 1. This specification is based upon assignments of error numbered 1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 15, 17, 19, 20, 22, 23, 25, 26, 27 and 28. Most of these assignments specify the refusal of the trial court to make certain findings of fact requested by the Indemnity Company. These assignments, as we have stated, cannot be considered because the requests therefor were made too late. This is true in the case of the following assignments: 2, 3, 4, 5, 6, 9,

10, 11, 13, 15, and 20. Of the other assignments referred to by appellant in support of this specification of error, Nos. 17, 23, 25, 26, 27 and 28 are too general to be considered. Virginia Ry. Co. v. Chambers, 36 F.(2d) 20; U. S. Shipping Board E. F. Corp. v. Drew, 288 F. 374; Columbia Pictures Corp. v. Lawton-Byrns 73 F.(2d) 18. Assignment No. 22 is "that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact". This assignment is not only too general, but it embraces three different assignments of error contrary to our rule 11. The alleged errors embraced in this assignment are as follows: First, "that the judgment is contrary to law * * *". This cannot be considered because too general. Washburn v. Couthit, 73 F. (2d) 23. Second, "* * * it is not justified by any evidence". This assignment is also too general and is not based upon any ruling of the court pointed out in the specification. Hecht v. Alfaro, 10 F.(2d) 464. Third, nor is it supported by findings of fact". This latter assignment, if entirely separate from the other two, would be a proper assignment to challenge the sufficiency of the findings of fact to support the judgment. Assignment 22 need not be considered because it violates the rule requiring assignments of error to "set out separately and particularly each error asserted and intended to be urged."

Assignments of error Nos. 1 and 19 are yet to be considered.

Assignment No. 1 assigns as error the denial of appellant's motion for nonsuit. The appellant proceeded after the ruling to offer its testimony and thus waived any error in the ruling. Bogh v. Gassert, 149 U. S. 17; Maryland Casualty Co. v. Jones, 35 F.(2d) 791; United States v. Alberby, 63 F.(2d) 965.

Assignment No. 19 is "that the judgment is contrary to law in this, that it adjudges in effect that the plaintiff can recover as and for an assignment of the judgment, whereas her sole right of recovery is for contribution or reimbursement and not as assignee of the judgment". This assignment does not point out a ruling of the trial court on any proposition of law or fact claimed to be erroneous. If the appellant desired a ruling of the trial court upon a proposition of law involved in the case not arising from the rulings upon the introduction or rejection of evidence, or the overruling of its motions or demurrers, it should have formulated its proposition of law and have requested a ruling thereon. Hecht v. Alfaro, 10 F.(2d) 464, supra. The basic difficulty in the presentation of this appeal is the assumption by the Century Indemnity Company that it could raise its various contentions by requests for findings of fact made after the trial was concluded. Although the appellant moved for judgment, presumably upon the ground that the evidence would not support a judgment in favor of the plaintiff and appellee, it did not except to the ruling of the court denying the motion nor did it assign such ruling as error. Assignments 25, 26,

27 and 28 (cited in footnote 1) do not refer to that ruling and are too general. The assignment should be, "The court erred in denying the defendant's motion for judgment." An assignment of error must be based upon an error which actually occurred in the trial of the case. If no error occurred there is no basis for the assignment. Gartner v. Hays, 272 F. 896. Here, as we have said, the failure to make findings requested after the trial was not an error during the course of the trial and is not reviewable.

Specifications of error stand upon a different footing, being required by rule of this court and by the rules of most appellate courts for the convenience of the court and for greater certainty in the presentation and disposition of cases on appeal. For that reason we have been more liberal in dealing with the matter of specifications of error in the brief than in dealing with assignments of error in the record. A violation of our rule, however, justifies the court in refusing to consider the specifications which violate the rule.

The judgment is affirmed.

(Footnote 1):

25. That the said court erred in ordering, rendering and in entering final judgment herein on June 16, 1934.

26. That the said court erred generally in refusing to order judgment in favor of this defendant and against plaintiff.

27. That the said court erred in ordering judgment for plaintiff for any sum at all.

28. That the said court erred in refusing to order judgment for the defendant upon the evidence in the cause.

DENMAN, Circuit Judge, Dissenting:

I am unable to concur in the denial of the consideration of the merits of the contention of this petition for rehearing, namely, that the court erroneously held the findings support the judgment.

In the opinion so holding we proceeded ex industria to discover that the following assignment of error

> "that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact"

violated a procedural rule because it contains the assignment of more than one error and fails to "set out separately and particularly each error assigned and intended to be urged".

I say ex industria, because the first brief of the appellant on the appeal set forth this contention, as follows:

> "The findings, conclusions of law, and judgment of the court are, therefore, not sustained by any findings and are not in accord with the law of the case as established by this court in its prior decision."

And also:

> "Therefore, the judgment of the court in the present instance is not only not sustained by any findings but * * *."

The brief of the appellee meets the contention under this statement of the error with many pages of argument. What is important is, that appellee never then questioned that the court is sufficiently

advised of the claimed merits of the appeal by the assignment of error which says that judgment is not sustained *either** by the evidence or by the findings. He did not only not raise any question as to the imperfection of the assignment, but he assumes, and, in effect, by his silence, admits it is good.

Having ex industria found that the assignment of two errors does not comply with the rule for their separation, our first opinion on this appeal then proceeds to state:

> "It is exceedingly unsatisfactory to dispose of this case solely because of failure of the parties to comply with the rules pertaining to the assignments of error and specifications of error."

And it then goes on to hold that the findings do sustain the judgment in the following holding:

> "In view of the findings, first, that the value of the property released by the Indemnity Company's bond amounted to $6,000, second, that the San Francisco Iron & Metal Company had assumed and agreed to pay the debt of N. Abraham, it follows from our decision on the former appeal that the judgment of the trial court is correct."

It is obvious from this holding that the court was in no way embarrassed in discovering what

*Italics are the Court's.

the two parties agreed as to one of the questions of merit in the appeal.

The petition of the appellant seeks rehearing on the ground that the court erred in the above holding that the findings support the judgment. What is more important, is that the appellee, *in his reply to the petition for rehearing,** assumes the merits of the contention is under consideration by the court in a chapter headed.

> "Did the court err in concluding that the findings support the judgment?"

I believe that the reasons presented in the petition warrant the granting of the rehearing. That, *however, is not the question to which this dissent is addressed.*

It is with reference to the attitude and emphasis of a court of justice, which has jurisdiction of an appeal, in the examination of procedural steps to inform itself as to the merits of the appeal, where both parties argue the merits as if the necessary procedural steps had been taken, and raise no question of deficiency or absence of assignment.

In this case there is no failure to assign as error that the findings did not support the judgment. The assignment is there; it was clear—so clear that it caused our ruling on it. What is done by this second opinion and decision, to which this is a dissent, is to refuse to consider the merits of the petition for rehearing by striking out from the original opinion the holding to which the petition

---

*Italics are the Court's.

is addressed, thereby basing the opinion solely on this issue of the violation of our rule requiring separate statements of assigned error.

Even if the error had not been assigned at all, we have exercised our discretion to consider it and, in my opinion, would have abused that discretion if we had not. *After having exercised it,** it seems a denial of justice to frustrate the consideration of the correctness of our ruling by the mere process of blotting it out of the opinion to which the petition is addressed.

The suggestion that a *claim* of plain error is not sufficient, but that there must actually have been error to cause our examination of the record, involves a casuistry which defeats itself.

The Supreme Court makes no such mistake. The decision of Mutual Life Ins. Co. v. Parkinson, (CCA-6) 72 Fed.(2d) 759, cited in our original opinion on this appeal, in turn relies upon the Supreme Court decision of Columbia Heights Co. v. Rudolph, 217 U. S. 547. In that case the Supreme Court construed its then rules 21 and 35 which reserved the right to consider plain error unassigned. The court held that it is the *claim* of error made by the plaintiff in error and not the actual existence of error which permits the invocation of the rule that the claim may be considered. This is apparent because the court did examine the record under the claim of unassigned error and did find that it was not error. Its language is:

*Italics are the Court's.

> "* * * For these reasons we shall exercise the option reserved under both rules 21 and 35 of examining the transcript that we may be advised as to whether there has occurred any 'plain error' which obviously demands correction.
>
> 1. Did the court err in allowing an assessment of benefits under the act of June 6, 1900? We think not." (Here follows two pages of discussion why the record shows they did not so "think".)
>
> Columbia Heights Co v. Rudolph, supra, 552.

See also Wiborg v. U. S., 163 U. S. 632, 658.

The presence of the two errors in the assignment which fails to comply with our rule, in no way concerns the jurisdiction of the court. Since the jurisdiction is here and the parties are here, each urging his contention on the merits of the claim of appellant, and appellee does not complain of the assignment; and since the assignment fully informs us of what the contention is, our industrious discovery of a technical procedural reason for refusing to consider its merits cannot be said to be the search for justice for which the Federal courts were created.

Concerning Rule 42 of the United States District Court for the Northern District of California, it is my opinion that this rule was intended to create a situation equivalent to a treatment of the decision as merely tentative and thereby extending the trial, and not to create a final disposition of the cause. I agree that if this rule could be interpreted to convert an announced decision into a statement

of the judge that "I am now inclined to decide this case for such a party and desire proposed findings for my further enlightenment", the claimed error, in the denial of the proposed findings in this case could be considered as a more tenable contention, but I cannot so construe the phraseology of the rule.

I do not care to indicate what would be the effect of a standard form of such a tentative decision, required by a rule to be used by all the judges of the District Court and actually used in announcing such tentative decision, on the question whether findings thereafter requested, are requested "during the trial".

[Endorsed]: Opinion and Dissenting Opinion. Filed Jun. 7, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7618

THE CENTURY INDEMNITY COMPANY, a Corporation,

Appellant,

vs.

G. NELSON,

Appellee.

JUDGMENT

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Jun 7, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, July 19, 1937.

Before: DENMAN, STEPHENS and HEALY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition of appellant, filed July 2, 1937, for a rehearing of above cause, and of appellee's reply thereto, filed July 12, 1937, and by direction of the Court, it is ordered—Denman, Circuit Judge, dissenting,—that the said petition for rehearing be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Redman, Alexander and Bacon, counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including September 1, 1937; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN,
United States Circuit Judge.

Dated: San Francisco, California, July 22, 1937.

[Endorsed]: Filed Jul. 22, 1937. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and eighty-three (183) pages, numbered from and including 1 to and including 183, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 14th day of August, A. D. 1937.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 185] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 362

Office - Supreme Court, U. S
FILED
AUG 30 1937
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1937

THE CENTURY INDEMITY COMPANY
(a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

Petition for Writ of Certiorari To the United States Circuit Court of Appeals for the Ninth Circuit.

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No.....

In the Supreme Court of the United States

OCTOBER TERM, 1937

THE CENTURY INDEMITY COMPANY (a corporation),

Petitioner,

vs.

G. NELSON,

Respondent.

Petition for Writ of Certiorari To the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Century Indemnity Company, a corporation, respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment entered by that court in the above entitled cause on June 7, 1937, affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 167-181) is reported as ..... F. (2d) ..... The District Court made special findings (R. 35-49), but rendered no opinion.

SUMMARY STATEMENT OF PROCEEDINGS BELOW.

Respondent brought action in the District Court to recover the sum of $6000 on a bond or undertaking executed by petitioner to release an attachment levied in a state court action. Petitioner prevailed originally but the judgment was reversed and a retrial ordered (65 F. (2d.) 765). Respondent prevailed on the retrial and the judgment was affirmed on June 22, 1936 (R. 164-165). The opinion is in the record (R. 152-164) but is otherwise unreported. Rehearing was granted August 17, 1936 (R. 165). The judgment to be reviewed was entered on June 7, 1937, and the judgment affirmed on procedural grounds by a divided court (R. 182). Petition for rehearing was denied on July 19, 1937 (R. 182), and the issuance of the mandate stayed until September 1, 1937, and thereafter until the final determination of this petition (R. 183).

JURISDICTION.

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code (U. S. C. 28:347; 43 Stat. 938).

SPECIFICATION OF ERRORS.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts of appeals in matters of procedure.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the matter of considering plain error.

SUMMARY STATEMENT OF THE CASE.

On February 14, 1929, petitioner executed a bond or undertaking in the penal sum of $6000 to release an attachment levied on the property of defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, and L. Silberman, in a state court action entitled "Berges v. Abraham, et al." (R. 36-41). On February 26, 1929, Fidelity and Casualty Company of New York, a corporation, executed a bond or undertaking of the same character and amount to release an attachment levied in said action on the property of defendant N. Abraham (R. 47-48). Plaintiff Berges in the state court action recovered judgment on October 29, 1929, for the sum of $5643.65 against defendants Abraham, L. Silberman, and San Francisco Iron & Metal Company (R. 41-42). Fidelity and Casualty Company of New York thereupon paid Berges the amount of the judgment with interest and costs (R. 42), took an assignment thereof in the name of respondent G. Nelson (R. 42), and commenced the present action against petitioner to recover

the full amount thus paid with accruing interest (R. 10).

The present action was twice tried. The outcome of the first trial was judgment for petitioner on the theory that Fidelity and Casualty Company of New York was obligated under its said bond or undertaking to pay the judgment in the state court action and that when it paid plaintiff Berges the full amount thereof the judgment was satisfied and extinguished; and that, as the complaint was based solely on an assignment, the pleadings were insufficient. In reversing that judgment and ordering a retrial the Circuit Court of Appeals said that the payment thus made amounted "to an assignment of the judgment with a right to enforce the same to the extent to which the assignee would be entitled to recover by way of contribution or reimbursement and no more." (65 F. (2d) 765, 767).

The outcome of the second trial was judgment for respondent for the full amount paid by Fidelity and Casualty Company of New York with accruing interest (R. 50-51). Prior to submission of the cause both parties moved for special findings (R. 130), and on May 31, 1934, judgment was ordered for respondent "upon Findings of Facts and Conclusions of Law to be presented" (R. 20-21). Both parties accordingly proposed special findings and conclusions, respondent on June 6, 1934 (R. 35-49), petitioner on June 11, 1934 (R. 21-35). Those proposed by respondent were accepted and signed by the trial judge on June 16, 1934 (R. 49). Those proposed by petitioner were

rejected and refused. The procedure thus followed by the court and the parties conformed to Rule 42 of the said District Court[1] (R. 170).

On appeal from the judgment petitioner urged that the judgment lacked evidentiary support. It urged

---

1. Rule 42: "In actions at law in which a jury has been waived by written stipulation filed by the parties or by oral stipulation made in open court and entered in the record, it shall be in the discretion of the Court to make special findings of fact and conclusions of law upon the issues raised by the pleadings.

In suits in equity, including those required to be heard before three judges, and in granting or refusing interlocutory injunctions, the Court shall find the facts specially and state separately the conclusions of law upon the issues raised by the pleadings. in accordance with Supreme Court Equity Rule 70½ as amended November 25, 1935.

In actions at law, where a request for special findings of fact is made and granted, and in suits in equity, no judgment or decree shall be entered until the findings of fact and the conclusions of law shall have been signed and filed, as herein provided. The rendition of the opinion or memorandum order shall be deemed and considered as merely a preliminary order for judgment or decree.

Within five days after written notice of the opinion or memorandum order, the prevailing party shall prepare a draft of the findings of fact and the conclusions of law, and lodge them with the Clerk, serving a copy thereof upon the adverse party, who may, within five days thereafter, lodge with the Clerk and serve upon the adverse party such proposed amendments or additions as he may desire. If the prevailing party fails to lodge and serve such draft within five days, as herein provided, the adverse party may, within five days thereafter, prepare and lodge a draft, serving a copy on the prevailing party.

The findings of fact and the conclusions of law shall thereafter be settled by the Judge, and when so settled, shall be engrossed, and approved as provided in Rule 22, within five days thereafter, and shall be then signed by the Judge and filed.

A failure to comply with the requirements of this rule may be deemed to be a waiver by the party so failing.

Findings of fact must be of the ultimate facts in issue, as distinguished from conclusions of law on the one hand, and mere evidence on the other, and must cover all the material issues raised by the pleadings, which facts must be set out in narrative form and not incorporated by reference to the pleadings."

that the judgment was not supported by the findings of fact. It urged that the judgment was contrary to the law of the case established on the former appeal. And it urged that the trial court had erred in its rulings on evidence. The attack on the sufficiency of the evidence was stressed in connection with assignments of error directed at the refusal of the trial court to find in accordance with petitioner's proposed findings. Respondent joined issue solely on the merits of the appeal and at no time challenged the form or sufficiency of any assignment or specification of error made by petitioner.

The Circuit Court of Appeals affirmed the judgment on June 22, 1936 (R. 164-165), granted a rehearing on August 17, 1936 (R. 165), and again affirmed the judgment on June 7, 1937 (R. 181-182).

In the opinion of June, 1936, the Circuit Court of Appeals concluded that every assignment and specification of error made by petitioner was defective in form and insufficient to evoke consideration (R. 151-164). It concluded that the trial had been completed before findings of fact and conclusions of law were signed by the trial court and, therefore, that the actions and rulings thereon could not be reviewed on appeal (R. 153-154). Notwithstanding a technical outlook on the procedural aspect of the case the Circuit Court of Appeals commented on the merits of the appeal and concluded that the judgment possessed evidentiary support (R. 163); that the judgment was supported by the findings of fact (R. 162); that the judgment was not contrary to the law of the case (R.

162); and that there was no error in the rulings on evidence (R. 162). It saw no occasion to notice plain error (R. 164).

The petition for rehearing addressed to the opinion of June, 1936, urged that the conclusions on procedure were too technical and that the conclusions on the merits of the appeal were unsound.

In the majority opinion of June, 1937, after rehearing, the decision was based solely on procedural grounds and all reference to the merits of the appeal eliminated. (R. 167-175). This is persuasive indication that petitioner's points on the merits were well taken. The minority opinion (R. 176-181) sums up the position of petitioner. It is there said:

> "What is important is, that appellee never then questioned that the court is sufficiently advised of the claimed merits of the appeal by the assignment of error which says that judgment is not sustained *either* by the evidence or by the findings. He did not only not raise any question as to the imperfection of the assignment, but he assumes, and, in effect, by his slience, admits it is good." (R. 176-177).

> "In this case there is no failure to assign as error that the findings did not support the judgment. The assignment is there; it was clear—so clear that it caused our ruling on it. What is done by this second opinion and decision, to which this is a dissent, is to refuse to consider the merits of the petition for rehearing by striking out from the original opinion the holding to which the petition is addressed, thereby basing the opinion solely on this issue of the violation of

our rule requiring separate statements of assigned error," R. 178-179).

"Even if the error has not been assigned at all, we have exercised our discretion to consider it and, in my opinion, would have abused that discretion if we had not. *After having exercised it,* it seems a denial of justice to frustrate the consideration of the correctnes of our ruling by the mere process of blotting it out of the opinion to which the petition is addressed." (R. 179.)

"The suggestion that a *claim* of plain error is not sufficient, but that there must actually have been error to cause our examination of the record, involves a casuistry which defeats itself." (R. 179.)

"Since the jurisdiction is here and the parties are here, each urging his contention on the merits of the claim of appellant, and appellee does not complain of the assignment; and since the assignment fully informs us of what the contention is, our industrious discovery of a technical procedural reason for refusing to consider its merits cannot be said to be the search for justice for which the Federal courts were created." (R. 180.)

"Concerning Rule 42 of the United State District Court for the Northern District of California, it is my opinion that this rule was intended to create a situation equivalent to a treatment of the decision as merely tentative and thereby extending the trial, and not to create a final disposition of the cause." (R. 180.)

REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI.

(1) **The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts of appeals in matters of procedure.**

The decision sought to be reviewed is in direct conflict with decisions of the Second and Eighth Circuit Courts of Appeals:

Thompson-Starrett Co. v. La Belle Iron Works (2 C. C. A.), 17 F. (2d) 536, 539;

United State Fidelity & G. Co. v. Board of Com'rs (8 C. C. A.), 145 F. 144, 151;

Mercantile Trust Co. v. Wood (8 C. C. A.) 60 F. 346, 348.

In *United States Fidelity & G. Co. v. Board of Com'rs*, supra, it was said at page 151:

> "The verdict of a jury concludes all issues of fact and of mixed law and fact save those questions of law which have been reserved for review by demurrer, motion, request, or exception. A finding of the court without a jury has the same effect, with the single exception that when the finding is special the question whether the facts found sustain the judgment is open to review. In the trial of an action by the court without a jury the rulings of the court in the progress of the trial, and those only, are open to review. The true test for determining whether or not a question or ruling in a trial by the court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury.

> The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of a trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

In *Mercantile Trust Co. v. Wood,* supra, it was said at page 348:

> "The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed, the trial is ended. Exceptions to the finding, or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with it, avail nothing. They are as futile as exceptions to the verdict of a jury. When a case comes to this court upon a writ of error, this is a court for the correction of the errors of the court below solely. To enable us to review those errors in a case tried by the court it must appear that the legal propositions on which they rest were presented to that court and ruled upon before the trial ended, unless they are involved in the single question whether or not the facts found in a special finding are sufficient to sup-

port the judgment. It is, in the words of the statute, 'the rulings of the court in the progress of the trial of the case,' and these only, that we are authorized to review, unless such rulings are involved in the single question we have mentioned."

And in *Thompson-Starrett Co. v. La Belle Iron* Works, supra, it was said at page 539:

"It seems to us a needless and idle form to require the party aggrieved to request a ruling that putative future findings, or special findings already made, are without any evidence, and we regard an exception taken on that ground before final action of the court an exception to rulings made 'in the progress of the trial'."

The foregoing authorities are in accord with the statement of this Court in *Alexander v. Machan,* 147 U. S. 72:

"If the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court."

Contrary to the rule of the foregoing decisions the present decision is committed to the rule that the trial in the District Court ended on May 31, 1934, when the trial judge ordered judgment for respondent, and not on June 16, 1934, when the trial judge took final action by signing the special findings and conclusions which had been proposed and settled in accordance with the order of the court under its own Rule 42. As the trial was still in progress until the final action of the trial judge his actions and rulings on special findings were clearly reviewable on appeal. The Circuit Court of Appeals was distinctly in error in declining to review the assignments and specifications of error based upon such actions and rulings. Said Rule 42 does not transcend any statute limiting review on appeal. It merely regulates the manner in which a trial by the court is to end.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the matter of considering plain error.

This Court has held that a total absence of evidentiary support constitutes plain error.

Wiborg v. United States, 163 U. S. 632;
Clyatt v. United States, 197 U. S. 207.

This Court has also held that the failure to make a finding to support a judgment should be noticed as plain error.

Mahler v. Eby, 264 U. S. 32.

Where, as in the present case, an appellee does not challenge the form of the assignments or specifications

of error, it is the particular duty of an appellate court to notice plain error.

Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547.

Plain error is always present where, as in the instant case, a judgment is contrary to the law of the case. In such cases the plain duty rests on a court of appeal to examine the record, after retrial, to see if the judgment works violence to the law of the case.

Continental Ins. Co. v. Reading, 259 U. S. 156;
In Re Sanford Ford & Tool Co., 160 U. S. 431;
The Santa Maria, 10 Wheat. 431;
Mitchell v. United States, 15 Pet. 52.

Where facts are not found to justify a judgment, plain error is always present and may not be ignored by an appellate court. The appellate court cannot supply findings: its duty is to reverse the judgment.

E. A. Packer (Steam Tug E. A. Packer v. New Jersey Lighterage Co.), 140 U. S. 360;
Preston v. Prather, 137 U. S. 604.

This Court has accorded a very broad meaning to the term "plain error." In *Pierce v. United States,* 255 U. S. 398, an improper allowance of interest was deemed "plain error," and in *Columbia Heights Realty Co. v. Rudolph,* 217 U. S. 547, the court examined the following questions as typifying "plain error": (a) error in allowing an assignment; (b) error because jurors were not examined as to their qualifications; (c) error in overruling a plea of *res judicata;* (d) errors in instructions; and (e) error in

refusing to review evidence and determine if a verdict was unjust and unreasonable.

The majority opinion of the Circuit Court of Appeals recites point after point disclosing "plain error" but it declines to review them for reasons of technical procedure. As said in the dissenting opinion, "The Supreme Court makes no such mistake." (R. 179.)

CONCLUSION.

Wherefore petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment in the above entitled cause be reviewed and reversed.

Dated, San Francisco, California.
August 23, 1937.

OLIVER DIBBLE,
Counsel for Petitioner.

REDMAN, ALEXANDER & BACON,
R. P. WISECARVER,
Of Counsel.

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CHARLES ELMORE

In the Supreme Court of the United States

No. 362

OCTOBER TERM, 1937

THE CENTURY INDEMNITY COMPANY (a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

BRIEF FOR PETITIONER.

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In the Supreme Court of the United States

No. 362

OCTOBER TERM, 1937

THE CENTURY INDEMNITY COMPANY (a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported as 90 F.(2d) 644.

JURISDICTION.

As stated in the petition for certiorari (p. 2), jurisdiction of this court was invoked under section 240(a) of the *Judicial Code* (U. S. C. 28: 347; 43 Stat. 938).

STATEMENT OF CASE.

The complaint in the District Court alleged that petitioner (defendant) was obligated to pay a judgment entered in a state court action, and assigned to respondent (plaintiff), under a bond or undertaking executed by petitioner to release an attachment levied in the state court action (R. 1-11). The answer denied liability, and averred specially that the real party plaintiff in interest was Fidelity and Casualty Company of New York, a corporation, which had obligated itself to pay and had paid the judgment in the state court action, under a bond or undertaking of similar character (R. 12-19).

The following undisputed facts were developed at the trial: On February 14, 1929, petitioner executed a bond or undertaking in the penal sum of $6000.00 to release an attachment levied on the property of defendants the San Francisco Iron & Metal Company, a corporation, H. Silberman, and L. Silberman, in a state court action entitled *"Berges v. Abraham, et al."* (R. 36-41). On February 26, 1929, Fidelity and Casualty Company of New York, a corporation, executed a bond or undertaking of similar character and amount to release the attachment levied on the property of defendant Abraham (R. 47-48). In the state court action plaintiff Berges recovered judgment on October 29, 1929, for the sum of $5643.65, interest and costs, against defendants Abraham, L. Silberman, and the San Francisco Iron & Metal Company (R. 41-42). The full amount of the judgment, with interest and

costs, was paid by Fidelity and Casualty Company of New York on February 21, 1930, but an assignment thereof was taken in the name of G. Nelson (R. 42). G. Nelson, the present respondent, was then a stenographer in the office of the attorneys for Fidelity and Casualty Company of New York, and the assignment was taken for its benefit (R. 100).

During the course of the trial in the District Court, the entire judgment roll in the state court action was admitted in evidence over the objection of petitioner, its position being that only the judgment was admissible (R. 58). Included in the said judgment roll, among the findings of fact, was a recital that the San Francisco Iron & Metal Company had assumed the obligations and liabilities of Abraham (R. 84-85). However, testimony at the trial given by one Silberman disclosed that an assumption of such character did not exist *inter sese* as to the defendants in the state court action (R. 122, 129).

Prior to the submission of the cause in the District Court both parties moved for judgment and requested findings (R. 130). The request was tacitly granted and so understood by the parties. Thereafter, the cause was orally argued and briefed (R. 130). Judgment was ordered for plaintiff (respondent) on May 31, 1934, "upon Findings of Fact and Conclusions of Law to be presented" (R. 21).

Pursuant to Rule 42 of the said District Court (R. 170), also quoted at page 5 of the petition for certiorari, special findings and conclusions were prepared and served by respondent on June 6, 1934 (R. 35-49),

and by petitioner on June 11, 1934 (R. 21-35). Those proposed by petitioner were rejected and refused. Those proposed by respondent were accepted and signed on June 16, 1934 (R. 49). Judgment against petitioner was entered the same day in the sum of $6000.00, interest from September 24, 1931, and costs (R. 50-51). An appeal from the judgment was allowed petitioner (R. 140).

In an opinion affirming the judgment on June 20, 1936, the Circuit Court of Appeals concluded that every assignment or specification of error made by petitioner was defective in form and ineffectual to evoke consideration (R. 151-164). It concluded that the trial had ended before the findings and conclusions were signed and, therefore, that the actions and rulings thereon were not open to review (R. 153-154). The opinion stated, however, that the judgment was not contrary to the law of the case established on a former appeal, because of the finding in the state court action that the San Francisco Iron & Metal Company had assumed the obligations of Abraham (R. 162). The opinion also stated that the judgment possessed evidentiary support even if the said finding in the state court action were disregarded, because Silberman had given similar testimony at the instant trial (R. 163-164). And the opinion further stated that the judgment was supported by the findings, because of a finding that the San Francisco Iron & Metal Company had assumed the obligations of Abraham (R. 162). Again, the opinion stated that the ruling admitting the entire judgment roll in the state court action was without error as that was the

proper way to prove the judgment (R. 162). And the opinion also stated that there was no occasion to notice plain error (R. 164).

The Circuit Court of Appeals granted a rehearing on August 17, 1936 (R. 145).

On June 7, 1937, the judgment was once more affirmed by a majority opinion entitled "Opinion as Amended" (R. 167-175). This majority opinion was based solely on procedural grounds and contained no reference to the merits of the appeal. There was a dissenting opinion reciting that failure to consider the merits of the appeal "cannot be said to be the search for justice for which the Federal Courts were created" (R. 176-181). While it is obvious that the opinion of June 7, 1937, entirely superseded the opinion of June 20, 1936, both opinions are nevertheless printed in the reports (90 F. (2d) 644). This situation has prompted respondent to assume that the two opinions are an entity forming the opinion in the cause, and that petitioner, like the author of the dissenting opinion, is in error in believing that the merits of the appeal passed unconsidered by the Circuit Court of Appeals (Bf. Resp. on Petition for Certiorari, pp. 17-18).

Petitioner is mindful of the rule that this Court, ordinarily, will only consider the specifications of error set forth in the petition for a writ of certiorari.

Helvering v. Taylor, 293 U. S. 507, 511.

But petitioner is also mindful of the rule that where the entire record is before this Court, authority is

present to direct such disposition of the cause as the Circuit Court of Appeals might have made upon the appeal from the District Court.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 567.

Therefore, petitioner has deemed it advisable and perhaps necessary to discuss the merits of the appeal and demonstrate that prejudice resulted from the procedural errors specified.

SPECIFICATION OF ERRORS.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on matters of procedure.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the matter of considering plain error.

ARGUMENT.

(1) THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS IN MATTERS OF PROCEDURE.

Herein the Circuit Court of Appeals held that the trial in the District Court ended on May 31, 1934, when the trial judge ordered judgment for plaintiff, and not on June 16, 1934, when he signed the findings and conclusions proposed and settled in accordance with the order of the court under its Rule 42. The holding was based on the decision of the same court in

Continental Nat'l Bank v. Nat'l City Bank of N. Y., 69 F.(2d) 312, 317 (R. 169-170).

Under said Rule 42 the order of May 31, 1934, was "merely a preliminary order for judgment" (R. 170). Consequently, a civil cause tried and determined by the court without the intervention of a jury is still in progress until findings and conclusions are proposed, settled, and signed under the Rule. In no respect, therefore, does the Rule transcend the statutory limitation imposed by section 700 of the Revised Statutes (28 U. S. C. A. 875).[1]

As early as 1869 the rule was announced that in such causes a trial is still in progress until the trial judge makes his formal findings and conclusion.

Clement v. Phoenix Insurance Co., Fed. Cas. No. 2882.

The rule still prevails according to the decisions of the Second and Eighth Circuits.

Thompson-Starrett Co. v. La Belle Iron Works (2 C. C. A.), 17 F.(2d) 536, 539;

United States Fidelity & G. Co. v. Board of Com'rs (8 C. C. A.), 145 F. 144, 151;

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1. Sec. 700, R. S. (28 U. S. C. A. 875): "When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title (R. S. 649), the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

And confirmation of the rule is found in the decision of this Court in *Alexander v. Mackan,* 147 U. S. 72, saying that "if the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, * * * the question may be brought up for review in that particular".

In the *National Bank* case upon which the present decision is based Rule 42 was not involved or considered. And if the decision of the Circuit Court of Appeals for the Ninth Circuit in *Lando v. Equitable Life Ins. Co. of U. S.,* 84 F.(2d) 640, be taken as opposed to the decisions in the Second and Eighth Circuits then the latter decisions contain the better law and should receive the approval of this Court.

Demonstrable prejudice resulted from the holding of the Circuit Court of Appeals in the instant case that the trial had ended before the findings and conclusions were signed, and the refusal, based on such holding, to consider the assignments and specifications of error based on the actions and rulings of the trial court respecting the findings and conclusions.

It was the law of the case, established on the former appeal (*Nelson v. Century Indemnity Co.,* 65 F.(2d) 765) that the judgment in the state court action was satisfied by the payment thereof by Fidelity and Casualty Company of New York (or its nominee), except to the extent that a right to enforce contribution or reimbursement might exist under the doctrine of co-suretyship. The facts in the present case

precluded application of that doctrine; for the sureties had no common principal and no common obligation as each had executed a bond or undertaking to release the property of different principals.

21 *Ruling Case Law* 1131;
50 *Corpus Juris*, 278, 279, 287;
Stearns Law of Suretyship, 4th Ed., p. 478;
Spencer on Suretyship, sec. 150;
Arant on Suretyship (1931), sec. 75, p. 337.

Nowhere in the findings signed by the court does it appear that the sureties had a common principal or a common obligation (R. 35-49). The findings proposed by petitioner and rejected, and upon which assignments and specifications of error were based, recited the undisputed facts and disclosed that the doctrine of co-suretyship was inapplicable, a right to enforce contribution or reimbursement nonexistent (R. 30-35). If the proposed findings had been adopted the lack of evidentiary support for the judgment would have been unmistakable. Substantial prejudice therefore resulted by the refusal of the Circuit Court of Appeals to review the actions and rulings on the findings and conclusions.

(2) THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THE MATTER OF CONSIDERING PLAIN ERROR.

(a) This court has held that a total absence of evidentiary support constitutes plain error.

Wiborg v. United States, 163 U. S. 632;
Clyatt v. United States, 197 U. S. 207.

There was a total absence of evidentiary support for the instant judgment. Respondent was the nominee of a surety which had paid a judgment and taken an assignment thereof. The judgment was accordingly satisfied except for the equitable purposes of contribution or reimbursement under subrogation.

California Civil Code, section 2847;[2]
California Civil Code, section 2848.[3]

The sureties herein involved were not co-sureties. Their principals were different, their obligations were different, their bonds or undertakings released different properties. The only competent evidence in the case showed that the judgment debt in the state court action was the personal obligation of defendant Abraham, and the Fidelity and Casualty Company of New York had alone bonded Abraham. Abraham, therefore, had no right to contribution or reimbursements from his co-defendants. And Abraham's surety stood on no better footing.

Underwood v. Metropolitan Nat. Bank, 144 U. S. 669;
Hamphill v. Mitchell (5 C. C. A.), 36 F.(2d) 233;

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2. Civ. Code, sec. 2847: "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses, but the surety has no claim for reimbursement against other persons, although they may have been benefited by his act, except as prescribed by the next section."

3. Civ. Code, sec. 2848: "A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all of his cosureties to contribute thereto, without regard to the order of time in which they became such."

U. S. v. National Surety Company, 298 F. 536;
March v. Barnet, 121 Cal. 419;
21 *Ruling Case Law* 313;
50 *Corpus Juris,* 529, 531;
60 *Corpus Juris,* 25.

The judgment clearly lacked evidentiary support and the Circuit Court of Appeals should have noticed "plain error" in that respect.

(b) This Court has also held that the failure to make a finding to support a judgment should be noticed as plain error.

Mahler v. Eby, 264 U. S. 32.

There is no finding in the record warranting a conclusion that the Fidelity and Casualty Company of New York (or its nominee) was entitled to contribution or reimbursement from petitioner. The findings are to the contrary. Findings II and III (R. 36) and finding XV (R. 47) are to the effect that the bonds or undertakings given by the respective sureties were for different principals, different obligations, different properties. The doctrine of co-suretyship was inapplicable; a right to enforce contribution or reimbursement did not exist. As the District Court made no finding to support the judgment, the Circuit Court of Appeals should have noticed plain error.

(c) Where, as in the present case, an appellee does not challenge the form of the assignments or specifications of error, it is the particular duty of an appellate court to notice plain error.

Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547.

In this connection it is said in the dissenting opinion in the present case:

> "The brief of the appellee meets the contention under this statement of the error with many pages of argument. What is important, is that appellee never then questioned that the court is sufficiently advised of the claimed merits of the appeal by the assignment of error which says that judgment is not sustained *either* by the evidence or by the findings. He did not only not raise any question as to the imperfection of the assignment, but he assumes, and, in effect, by his silence, admits it is good." (R. 176-177.)

(d) Plain error is always present where, as in the instant case, a judgment is contrary to the law of the case. In such cases the plain duty rests on a court of appeal to examine the record, after retrial, to see if the judgment works violence to the law of the case.

Continental Ins. Co. v. Reading, 259 U. S. 156;
In re Sanford Ford & Tool Co., 160 U. S. 431;
The Santa Maria, 10 Wheat. 431;
Mitchell v. United States, 15 Pet. 52.

On the former appeal, the Circuit Court of Appeals recognized the law that an assignment of a judgment to a third party carries with it the right to collect the full amount of the judgment from bonds or undertakings of the character involved. But the Court also recognized the rule that where the assignee is merely a nominee of a surety obligated to pay the judgment, the assignment merely carries with it a right to enforce contribution or reimbursement against co-sureties.

Nelson v. Century Indemnity Co. (9 C. C. A.), 65 F.(2d) 765, 767.

No findings were made in the trial court on the issues of contribution and reimbursement, although such were held necessary on the prior appeal and the proposed findings of petitioner were directed at that issue (R. 32-33). Nor did the trial judge make any conclusions respecting contribution or reimbursement (R. 49-50).

Under the authorities cited, a plain duty rested on the Circuit Court of Appeals to notice plain error.

(e) Where facts are not found to justify a judgment, plain error is always present and may not be ignored by an appellate court. The appellate court cannot supply findings: its duty is to reverse the judgment.

E. A. Packer (Steam Tug E. A. Packer v. New Jersey Lighterage Co.), 140 U. S. 360;
Preston v. Prather, 137 U. S. 604.

Previous arguments herein have demonstrated the applicability of the foregoing authorities.

(f) This Court has accorded a very broad meaning to the term "plain error".

Pierce v. United States, 255 U. S. 398;
Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547.

In the category of plain error must be placed the ruling of the trial judge admitting in evidence the entire judgment roll in the state court action (R. 53, 58, 130).

While a judgment roll is admissible in support of a plea of *res judicata* or estoppel, the judgment itself

is alone admissible where proof of an assignment is necessary.

Fennell v. United States, 67 F.(2d) 768, 769.

There was no basis for a plea of *res judicata* or estoppel in the present case. The judgment in the state court action was not determinative of the rights *inter sese* between the co-defendants in a later action.

Victor Oil Co. v. Drum, 184 Cal. 226, 239;
34 *Corpus Juris,* 505, 984;
2 *Black on Judgments,* sec. 599.

The rights *inter sese* between the co-defendants in the state court action were immaterial issues therein, and were not decided by the judgment and the co-defendants were not estopped by any finding therein.

Chapman v. Hughes, 134 Cal. 641;
Bank of Visalia v. Smith, 146 Cal. 398;
2 *Black on Judgments,* sec. 617.

Solely upon a finding in the state court action to the effect that as to the plaintiff therein the San Francisco Iron & Metal Company had assumed the obligations of Abraham, the District Court found that petitioner was obligated to respondent (R. 46). But as the finding in the state court action was not binding on the co-defendants *inter sese,* it could not bind a surety of any defendant, and therefore the admission of the finding in evidence (included in the judgment roll) was erroneous. This incompetent evidence was in no way supplemented by competent evidence of similar import. On the contrary, the witness Silberman testified in the District Court (and there

was no other testimony on the subject) that while the judgment in the state court action reflected a claim for which the co-defendants were liable to the plaintiff therein, it also reflected a personal obligation of Abraham which his co-defendants, *inter sese,* had not assumed (R. 119-130).

The admission of this incompetent evidence was of pivotal importance, and its rejection would have deprived the respondent of all basis for the claim asserted. Under the guise of plain error it should have been noticed by the Circuit Court of Appeals regardless of any minor imperfections in the assignments or specifications of error respecting it.

CONCLUSION.

Petitioner therefore, respectfully submits that the judgment of the Circuit Court of Appeals should be reversed, with directions to the District Court to enter judgment for petitioner.

Dated, San Francisco, California,
December 6, 1937.

OLIVER DIBBLE,
Counsel for Petitioner.

REDMAN, ALEXANDER & BACON,
R. P. WISECARVER,
Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY
(a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY
(a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

I.

CONCERNING PROCEEDINGS TO DATE.

Petitioner's "Summary Statement of Proceedings Below" (Pet. page 2) fails to inform the court that after the decision of the Circuit Court of Appeals on the first appeal (65 Fed. (2d) 765) wherein judgment for petitioner on the first trial was reversed

the petitioner, as losing respondent on that appeal, applied to this court for a writ of certiorari and its petition was denied. (*Century Indemnity Co. v. Nelson,* Oct. Term 1933, No. 456, November 6, 1933, 290 U. S. 683, 78 L. Ed. 588.) This bears materially on petitioner's claim here of "plain error", as will later appear.

Both opinions of the Circuit ~~Court~~ of Appeal on the present appeal are now reported in 90 Fed. (2d) 644 where the opinion on rehearing is treated as an amendment of the original opinion, just as it is on the record here.

II.

CONCERNING STATEMENT OF THE CASE.

Some additions should be made to petitioner's "Summary Statement of the Case". We will make these additions in connection with the points to which they specifically apply.

III.

FIRST REASON ASSIGNED BY PETITIONER.

It is (Pet. page 12) that the Circuit Court of Appeals erred in refusing to review the action of the trial judge in adopting the findings proposed by respondent and in rejecting the findings proposed by petitioner on the ground that such proceedings did not occur "during the progress of the trial". (28 U. S. C. A. Sec. 875.) Thereby the Appellate Court refused to

pass on the question whether or not the findings have support in the evidence and on other questions that appellant sought to raise on the basis of these same actions of the trial court.

The bill of exceptions in the record reads (pages 130-131):

"Mr. Wisecarver (Atty. for Petitioner). I wish also at this time to make a motion for judgment *and findings.*

Mr. Hadsell (Atty. for Respondent). We do the same on behalf of the plaintiff, for the full amount, and request findings.

Thereafter, the case was orally argued before the court and *was submitted* upon written briefs. *Thereafter* and on June 1, 1934, and outside the presence of the parties, the Court made and entered its order *granting judgment to the plaintiff with findings to be submitted.* Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff.

Thereafter and on June 16, 1934 the Court, without the presence of the parties, signed the proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the Court, and judgment was entered on said June 16, 1934."

The order of the trial court for judgment is at page 21 of the record and reads:

> "This case having been heretofore heard and submitted and due consideration having been had, *it is ordered that judgment be entered for plaintiff*, with interest and costs, upon findings of facts and conclusions of law to be presented."

So, plainly the trial had been concluded with the submission for decision.

The court will note:

1. That petitioner's motion for findings did not specify any finding whatever that petitioner desired the trial court to make and that petitioner with its motion did not offer any findings;

2. That petitioner's motion as made was for "findings" *generally* and not for any "*special* findings" then and there offered;

3. That petitioner's motion did not specify, even generally, what petitioner thought or desired the purport of the findings should be and that the petitioner did not state any grounds for the motion.

The court further will observe that petitioner's challenge to the findings actually made comes by a single assignment of error filed after judgment (Record page 138, Assignment No. 21) and directed only to one finding, and that petitioner's challenge to failures to find come by other assignments numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20 and 24.

The court will also note from Rule 42 of the District Court (quoted in full at page 5 of the Petition) that in this action the making of special findings of

fact is "in the discretion of the court" and that the rule provides the procedure by which the trial court will exercise such discretion.

So it is important that there shall not be confused into one thing two very separate things, namely:

(a) a request for particular findings to a particular effect and in particular words—that is, a request that the court adopt findings that the party has formulated and submits to the court with the request; and,

(b) a request that when the trial court shall decide a case on the law side it shall exercise its discretion to make findings by directing that findings shall be made to conform to the court's decision.

To ask for a particular finding to a particular effect is one thing; to ask generally that the court make findings is quite another thing.

To ask the court to make a particular finding to a particular effect is like asking the court to give some specific instruction to a jury. When the request for the instruction is made the instruction must be submitted with the request. Otherwise the trial court does not err in failing or refusing to give the instruction.

So here. If, when petitioner asked the trial court to make findings, the petitioner wanted findings in particular words or to a particular effect, petitioner then and there should have presented the formulated findings that petitioner wanted the trial court to make. But petitioner did not do so. The trial then closed

and the cause was submitted for decision as the record clearly states. There was no reservation made by either party of any right to offer or file proposed special findings in support of such party's motion for findings. The submission for decision was complete. The "progress of the trial" was done.

When the trial court, then, was considering the case after the parties' submission of the case for decision, *the court did not have before it for consideration any "special findings" whatever as requested by either party.* It was under these circumstances that subsequently, as the bill of exceptions states, "the court made and entered its order granting judgment to the plaintiff with findings to be prepared".

Very apposite to our case are the words of this same Circuit Court of Appeals in a case decided some weeks later than the first decision on the present appeal—*Lando v. Equitable Life Assur. Soc.,* 84 Fed. (2d) 640. Justice Denman, who dissents here on one phase of our case, there said for the court:

> "A jury was properly waived, and prior to the submission of the case the insured appellant moved for judgment in his favor and also moved for special findings. *Appellant did not specify the ultimate facts desired to be found. His mere motion that the court make findings one way or another as to the ultimate facts is not a request for findings of specific facts sufficient in itself to warrant a review of the evidence.* Seaboard Surety Co. v. U. S., 84 F. (2d) 348, decided by this court on June 8, 1936. So far as advising the lower court of the claim that the evidence required a judgment in his favor, the situation is

the same as if the appellant had made no more than a motion for such a judgment."

See reference to this case in note to the court's second opinion here. (Record page 170.)

Mr. Paul P. O'Brien, Clerk for the Circuit Court of Appeals for the Ninth Circuit, published in 1929, for the help of attorneys conducting appeals, a book entitled "Manual of Federal Appellate Procedure" (Second Edition) to which he also publishes cumulative supplements. In the "1937—Cumulative Supplement", dated September 1, 1937, he states at pages 9-10:

> "A request for judgment, or for a declaration of law, or for special findings of fact and conclusions of law, made after the case has been submitted, and the trial judge has announced his decision, but before formal judgment has been entered, comes too late and is not made 'during the progress of the trial' as required by Par. 700 R. S. (28 USCA Sec. 875). It is essential that such motions be made at or before the submission of the cause for decision, both in a case submitted upon an agreed statement of all the ultimate facts, as well as in cases tried by the court without a jury."

His citations are:

Continental Bank v. National City Bank, etc. (CCA 9), 69 F. (2d) 312;

Babbitt Bros. Trading Co. v. New Home Sewing Machine Co. (CCA 9), 62 F. (2d) 530, 536, concurring opinion of Wilbur, C. J.;

Columbia Nat. Life Ins. Co. v. Griffith (CCA 8) 73 F. (2d) 244, 248;

Sanfeliz v. Bank of Nova Scotia (CCA 1), 74 F. (2d) 338;

Huron College v. Union County Trust Co. (CCA 8), 77 F. (2d) 609;

Inland Irving Nat. Bank of Chicago v. American Flange and Mfg. Co. (CCA 7), 75 F. (2d) 553;

First Nat. Bank of San Rafael v. Philippine Corp. (CCA 9), 51 F. (2d) 218;

Lando v. Equitable Life Ass. Society of U. S. (CCA 9), 84 F. (2d) 640;

Armstrong v. Metropolitan Life Ins. Co. (CCA 8), 85 F. (2d) 185, and the present case of

Century Indemnity Co. v. Nelson (CCA 9).

Of these cases *Continental Bank v. National City Bank, etc.* (CCA 9), 69 Fed. (2d) 312, is an important case. Judge Mack of New York, sitting here, wrote the opinion for the court, saying:

> "Nevertheless, *the question remains whether or not rulings made and exceptions thereto taken, not merely after submission of the case, but even after the announcement by the court of its opinion and intended judgment, but before rendition of the final judgment, are made and taken 'in the progress of the trial.'* In the opinion in Edwards v. Robinson, supra (8 Fed. (2d) 726, 727—CCA 9), an examination of the record discloses what is not entirely clear from the opinion, that there, as here, the declarations of law were requested some

time *after* the judge had filed his opinion which concluded with the words 'the complaint will be dismissed'—but also some time *before* the trial judge signed and filed the actual judgment of dismissal and his own findings. This court there said that no motion or request for a finding in favor of plaintiff was made 'until long after the close of the trial, and not until 10 days after a decision in favor of the defendants had been announced by the court. Under such circumstances, we are without jurisdiction to consider the sufficiency of the testimony to support the findings.' There are also expressions of opinion in other cases that, for these purposes, *the progress of the trial is concluded when the cause is submitted to the judge, or at least when he announces his decision.* See Babbitt Bros. Trading Co. v. New Home Sewing Machine Co., 62 F. (2d) 530, 535, 536 (CCA 9th, 1932) (Judge Wilbur's concurring opinion); Merriam v. Huselton, 45 F. (2d) 983 C. C. A. 8th, 1930); United States v. Smith, 39 F. (2d) 851, 854 (C. C. A. 1st, 1930); Southern Surety Co. of Des Moines v. United States, 23 F. (2d) 55, 58 (C. C. A. 8th, 1927); Ewert v. Thompson, 281 F. 449, 450 (C. C. A. 8th, 1922). This interpretation accords with the function of the request for ruling and exception to the denial thereof; *it is to direct the judge's attention to the specific proposition of law relied upon, so that prior to the announcement of his conclusions he may have the opportunity to consider it.* True it is that after entry, and until the end of the term during which the judgment has been entered, it may be set aside and a new trial granted or if tried without jury, a contrary judgment entered,

> That, however, is a matter entirely within the court's discretion, and offers no guide to the scope of the general rule. We conclude that there were no rulings 'in the progress of the trial', properly before us for review, other than that on the evidence hereinabove considered."

This decision was made for the Ninth Circuit long before the second trial of our case and was therefore available as a guide to petitioner on such trial.

Thereupon the Continental National Bank petitioned this court for a writ of certiorari in a cause entitled *Continental National Bank v. National City Bank of New York,* and numbered 34 in October Term 1933. The petition was denied. (293 U.S. 557, 79 L. Ed. 659.) One of the reasons urged for the petition was that the decision of the Circuit Court of Appeals on the question in procedure, as above quoted, "is untenable and in conflict with the decision of another Circuit Court of Appeals on the same matter and in conflict with the weight of authority." (See Pet. page 11.) Said petitioner:

> "This case having been tried before a judge, without a jury, on a stipulation of facts spread at large upon the record and having special findings of fact and conclusions of law signed incorporating such stipulation of facts, the Circuit Court of Appeals erroneously refused to review the facts to ascertain if the same supported the judgment, because of an alleged failure to request a declaration of law *prior to the minute order for judgment.*"

Citing cases.

Also (page 12):

> "If such request for a declaration of law were necessary, then timely application therefor was made by petitioners as such application was made before final judgment and in the same term of court." (Citing cases.)

This reason for the petition was stated also in the specifications of errors (Pet. page 21) and at pages 33-36 of the petition authorities and argument are presented for the contention. The respondent filed a brief in opposition to the petition wherein at pages 19-23 respondent distinguished or discounted petitioner's authorities and cited many authorities against petitioner's contention. Therefore we would urge upon the court that its denial of the petition was in effect an affirmance of Judge Mack's opinion and is decisive against the petitioner in the present proceeding.

We fortify this conclusion with what this court itself, in *Arthur C. Harvey Co. v. Malley,* 288 U. S. 415, 418, 77 L. Ed. 886, 867, approved as rightly said in that case by the Circuit Court of Appeals for the First Circuit:

> "Exceptions, *following an order of judgment,* to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, *are not rulings in the course of the trial.*"

So here—exceptions to findings proposed by respondent and adopted by the court *after* the order for judgment for respondent was made "are not rulings

in the course of the trial"; and the same is true of exceptions to the trial court's rejection of findings proposed by petitioner (appellant) *subsequent* to the order for judgment.

The specific order of the court in our case was that "judgment be entered for plaintiff * * * upon findings of fact * * * to be presented." Thereby the court had determined what the findings should do; namely, that the findings should find the facts as respondent contended them to be and as entitled plaintiff to judgment. In effect the trial court had then ruled on the facts and the law and the trial had then ended in any event—even if the trial had not ended previously when the parties had unreservedly submitted the cause for decision. All that remained to be done was to formulate findings that should comply with the trial court's order for judgment. There was to be no further "trial".

Rule 42 of the District Court does not help petitioner. The purpose of that rule was not to extend the trial but simply to provide a means whereby the trial court would secure aid in formulating findings expressive of a decision already rendered. The Circuit Court of Appeals very properly so held in its last opinion for the reasons there stated. (Record page 170, Note 1.)

This view of the rule is embodied, in effect, in O'Brien's 1937 Supplement where he states at page 9:

> "The making of special findings of fact in an action at law, tried by the court, on the waiver of a jury, is discretionary with the trial court, and

its action in making such findings, in refusing to make requested findings, or in refusing to amend findings made, is not subject to exception, or to a subsequent review in a federal appellate court",

and cites:

Denver Live Stock Com. Co. v. Lee (CCA 8), 18 F. (2d) 11, 16;

Modoc County Bank v. Ringling (CCA 9), 7 F. (2d) 535, 536;

Kansas Society Life Ins. Co. v. Shirk et al. (CCA 10), 50 F. (2d) 1046.

Later, at page 11, O'Brien states:

"If a party seeks to have reviewed the question whether the record contains any substantial evidence to support the findings and judgment against him, it is incumbent upon him to make a motion for judgment in his favor on that ground, or to request a declaration of law to that effect, or to take some other equivalent step, and secure a ruling by the trial court, and to take exception to such ruling (and include the same in bill of exceptions)",

and cites to his statement:

Federal Intermediate Credit Bank of Omaha v. L'Herisson (CCA 8), 33 F. (2d) 841, 843;

Lyle v. Phillips Petroleum Co. (CCA 8), 72 F. (2d) 347;

Fidelity & Deposit Co. of Maryland v. U. S. ex rel. Woods (CCA 9), 72 F. (2d) 828;

Mittry Bros. Const. Co. et al. v. U. S. etc. (CCA 9), 75 F. (2d) 79.

See, also,

Huron College v. Union County Trust Co. (CCA 8), 77 F. (2d) 609;

McLaughlin v. Pac. Lumber Co., 293 U. S. 351, 55 S. Ct. 219, 79 L. Ed. 423;

U. S. v. Martin, etc. (CCA 10), 80 F. (2d) 460;

Century Furniture Co. v. Bernhard's, Inc. (CCA 9), 82 F. (2d) 706;

Lando v. Equitable Life Ass. Society of U. S. (CCA 9), 84 F. (2d) 640.

Plainly petitioner had not complied with any of these requirements.

The cases cited by petitioner are not against us.

In *Alexander v. Machan*, 147 U. S. 72, there were sixteen exceptions to findings and thirty-five exceptions to refusals to find; and the statement of this court, as quoted from that case by petitioner, is qualified by the clause "and an exception be taken". But the court's opinion does not say what the procedure should be and the report does not disclose what the actual procedure was. So the opinion is of no help here.

The case of *Mercantile Trust Co. v. Wood*, 60 Fed. 346, is in our favor because it says, as quoted by petitioner:

> "The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed the trial is ended. *Exceptions to the finding* or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with

> it, *avail nothing*. They are as futile as exceptions to the verdict of a jury."

So exceptions to the findings in our case "avail nothing".

Neither does *U. S. F. & G. Co. v. Board of Commissioners,* 145 Fed. 144, aid petitioner. The same judge wrote the opinion there as wrote the opinion in *Mercantile Trust Co. v. Wood, supra,* and cited the earlier case, with others, as deciding

> "The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

But, for the reason that the trial is ended when the findings are filed, there cannot be any exception to the findings as the exception does not occur "during the progress of the trial". Nor, after findings filed, can there be any exceptions to any failures to make findings; for the trial is ended and such exceptions come too late.

Petitioner's fourth case, *Thompson-Starrett Co. v. La Belle Iron Works,* 17 Fed. (2d) 536, is also favorable to us rather than to petitioner. The quoted language:

> "It seems to us a needless and idle form to require the party aggrieved to request a ruling that putative future findings, *or special findings already made,* are without any evidence, and we regard an exception *taken on that ground before final action of the court* an exception to rulings made 'in the progress of the trial' "

only means that it is sufficient, where special findings have already been made, to except, *before final action of the court,* on the ground that such findings are without evidence. But when findings have been filed final action has been taken and an exception comes too late —the very thing that has happened in our case.

The correct procedure was forcibly stated by this court in *Fleischmann C. Co. v. U. S.,* 270 U. S. 349, 70 L. Ed. 624, in these words:

> "To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. Norris v. Jackson, supra, 129 (9 L. ed. 609); Martinton v. Fairbanks, 112 U. S. 673, 28 L. ed. 863, 5 Sup. Ct. Rep. 321. That is, as was said in Humphreys v. Third Nat. Bank, 21 C. C. A. 538, 43 U. S. App. 698, 75 Fed. 855, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. *In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits'.*"

Petitioner failed completely to follow these requirements.

IV.

SECOND REASON ASSIGNED BY PETITIONER.

The claim is that, despite insufficiency of assignments and specifications of error, there is such "plain error" in the record that the Circuit Court of Appeals, in its *second* opinion on this appeal, should have passed on the merits and should have reversed the judgment.

(a)

Petitioner admits (Pet. pages 6-7) that the Circuit Court of Appeals, in its *first* opinion on this present appeal, decided the merits of the case against petitioner. Petitioner states:

> "Notwithstanding a technical outlook on the procedural aspect of the case the Circuit Court of Appeals commented on the merits of the appeal and concluded that the judgment possessed evidentiary support (R. 163); that the judgment was supported by the findings of fact (R. 162); that the judgment was not contrary to the law of the case (R. 162); and that there was no error in the rulings on evidence (R. 162). It saw no occasion to notice plain error (R. 164)."

If, then, the Circuit Court of Appeals had, in its *second* opinion, gone again into the merits there is no reason to believe that the result would have been any different.

Why the Circuit Court of Appeals refused, in its *second* opinion, to go into the merits is clear enough. For at the end of its *first* opinion, after passing on the merits, it said (Record, page 164):

> "There is, therefore, no reason for relaxing our rule with reference to the specifications of error and there is no basis for relaxing the rule with reference to assignments of error as should be done only in case of a plain error unassigned (rule 11) *and so clearly prejudicial as to result in injustice.* In re Morgan (C.C.A. 6), 26 F. (2d) 183; Mutual Life Ins. Co. v. Parkinson, C.C.A. 6), 72 F. (2d) 759."

That is, in the court's view, any refusal of the court to recognize unassigned (or insufficiently assigned) plain error on this appeal would not be "so clearly prejudicial as to result in injustice". When, therefore, the court in its *second* opinion concluded (as it had already concluded in its first opinion) that the errors on which petitioner really relied were not assigned or were not sufficiently assigned it had no reason to go further to examine the merits under any claim of "plain error unassigned". When the two opinions are taken together they must be deemed to hold that on this appeal the court would not overlook failures in assignments and specifications and go into the merits of the case on the basis of unassigned plain error—all for the reason that refusal to do so was not "so clearly prejudicial as to result in injustice".

(b)

Unassigned plain error will only be noticed where refusal to do so will be "so clearly prejudicial as to result in injustice".

The question then is:

Would that be the case here?

In its first opinion the Circuit Court of Appeals unanimously answered "no". After rehearing it maintained its stand by majority vote.

Even the dissenting opinion on the second decision on this appeal does not say that the merits of the case should be otherwise decided than on the first decision on this appeal. Mr. Justice Denman simply contends that the decision on the rehearing should be on the merits and not on technical procedure. For in his view there were sufficient assignments to justify that course.

To understand the problem we must go back to the first appeal.

On the first trial the judgment roll in *Berges v. Abraham* was admitted into evidence. (Record, page 45; No. 456 in this court for October term 1933.) In its opinion on the first appeal (65 Fed. (2d) 765) the Circuit Court of Appeals said (page 768):

> "According to the findings of fact in the Superior Court action the corporation, San Francisco Iron & Metal Company, which is alleged to be one of the copartners, together with L. Silberman, H. Silberman, and N. Abraham, acting under the firm name of N. Abraham Mercantile Company, was originally jointly liable for the indebtedness sued upon. N. Abraham Mercantile Company, the copartnership, transferred all the property of the copartnership to the corporation in consideration of an agreement on the part of the corporation to pay all the debts of the former partnership. This agreement would constitute the corporation a principal and the members of the copartnership and the copartnership sureties. Davis v. Heim-

bach, 75 Cal. 261, 17 P. 199; Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Imperial Refining Co. v. Kanotex Refinery Co. (C. C. A.), 29 F. (2d) 193, 199. If, therefore, the property seized by the sheriff was the property of the corporation, justice would require that this property be first subjected to the payment of the judgment for which the corporation was primarily liable before the property of N. Abraham, one of the partners for which appellant is surety, or of the other partners, is applied to the judgment, although the corporation is only a co-judgment debtor upon the face of the judgment."

And then, in reversing the judgment, the court laid down the law for the case thus:

"If it should appear from the evidence upon a new trial that there was sufficient property of the San Francisco Iron & Metal Company seized by the sheriff to satisfy the judgment, then the appellant surety (respondent on this second appeal), representing the rights of a joint debtor who was in law a surety on the obligation of that corporation, *would be entitled to enforce the entire judgment against the property of the corporation and therefore against the bond issued to release the property of the corporation.*"

"If, on the other hand, the property of the corporation thus released is insufficient to pay the judgment, the plaintiff (respondent on this second appeal) would be entitled to have the value thereof first applied to the judgment and as to any balance thereon to have one-half of the remainder thereof paid by L. Silberman and the enforcement of the

payment of that portion of the judgment against the undertaking of the appellee executed on his behalf."

The judgment was reversed and "the case remanded for further proceedings *not inconsistent herewith*".

On the retrial the trial court found (Record, pages 39-41):

"That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

'In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 204,668

V. Berges,
Plaintiff,
vs.
N. Abraham, et al.,
Defendants.

Stipulation.

It is hereby stipulated and agreed between plaintiff, defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr., and L. Silberman and the Century Indemnity Company, as follows:

1. That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman".

2. *That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6000.00 each.*

3. That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said former bond is hereby declared to be null and void and without effect.

Dated, February 14, 1929.

Robert E. Hatch,
Attorney for Plaintiff.
Louis E. Goodman,
Attorney for Defendants.
The Century Indemnity Company,
By F. J. Crisp,
Attorney in Fact.'"

This accorded with the allegations of the complaint (Record, pages 5-7) and the admissions in petitioner's answer. (Record, page 12.) So, by the very stipulation of this petitioner, "property, credits and effects" of San Francisco Iron & Metal Company had been attached to the extent of $6000.00; and, as the amount of respondent's claim (the judgment obtained by Berges in *Berges v. Abraham et al.*) was only $5643.65 principal plus a little interest and some costs (Record, page 105), the respondent became, as the Circuit Court of Appeals ruled in its opinion on the first appeal,

> "entitled to enforce the entire judgment against the property of the corporation and *therefore against the bond issued to release the property of the corporation*".

The District Court accordingly followed the directions of the Circuit Court of Appeals and gave judgment to respondent on that basis. (Record, page 49.) The judgment was for an even $6000.00 because the principal, interest and costs that had accumulated in *Berges v. Abraham et al.* to date of commencement of this action on September 24, 1931 exceeded $6000.00, the principal of petitioner's bond.

Also the District Court again admitted in evidence the judgment roll in *Berges v. Abraham.* (Record, page 58.) It also took additional evidence (Record, pages 119 to 130), namely the testimony of one Lon Harry Silberman. In its first opinion on this appeal the court reviewed Silberman's testimony and said (Record, page 163):

> "This evidence alone was sufficient to support the implied conclusion of the trial court that the San Francisco Iron & Metal Company had assumed the obligations of the copartners. It is clear that the judgment and findings in action No. 204668 are conclusive that the indebtedness sued upon was that of the partnership. It is therefore of no importance whether the findings in the superior court No. 204668 relative to the assumption of the entire debt by the San Francisco Iron & Metal Company is conclusive upon the parties to the action. We may assume as appellant contends that without additional evidence it is not."

Wherefore it is clear beyond argument that *under the law of the case as pronounced on the first appeal* the judgment was correct.

The substance of the decision on the *first* appeal is this: that Abraham and Silberman and San Francisco Iron & Metal Company were partners or joint adventurers and incurred a liability to the assignor of Berges; that thereafter San Francisco Iron & Metal Company assumed and agreed to pay the obligation; that Berges sued the three obligors and levied writs of attachment upon them separately and Abraham put up the bond of Fidelity & Casualty Company of New York in release of the attachment on him and the Century Indemnity Company put up a similar bond on behalf of Silberman and San Francisco Iron & Metal Company in release of attachments on them; that a judgment was later obtained by Berges against the three obligors and in the pleadings, findings and judgment it was made to appear that San Francisco Iron & Metal Company had assumed the obligation of the three defendants to Berges' assignor and had agreed to pay it; and that under these circumstances, when Fidelity & Casualty Company of New York paid Berges through Nelson on the basis of its bond and took an assignment of the judgment in Nelson's name, Nelson was entitled to recover the full amount of Berges' judgment from Century Indemnity Company.

That is the basis on which the case was retried and then decided in respondent's favor.

That also constitutes the "unassigned plain error" that petitioner claims to be "so clearly prejudicial as to result in injustice".

The injustice, if any, originated in the law of the case as established on the first appeal—seemingly approved by this court when it denied certiorari.

But we submit that justice has been done for the reasons stated in the opinion of the Circuit Court of Appeals on the first appeal.

(c)

The *second* decision on this appeal was rendered *June 7, 1937.* Petitioner promptly filed a petition for another rehearing and respondent replied. In our reply we called the court's attention to a case decided by the Supreme Court of California on *June 28, 1937,* entitled *Sanders v. Magill,* 94 Cal. Dec., page 34, where that court has fully confirmed our position. There Magill executed a note for $15,000.00 to a bank which he secured by a deed of trust upon real property. Later Magill transferred the property to one, Lyon, who, by Magill's deed to him, assumed and agreed to pay the encumbrance. At a later date Lyon endorsed and guaranteed the note at the bank and also pledged with the bank certain shares of stock which became the subject matter of the suit. The court said:

> "By this transaction, Lyon became the principal and the Magills the sureties of said note. (Braun v. Crew, 183 Cal. 728; Williams v. Naftziger, 103 Cal. 438, 440; Tompkins v. Powers, 106 Cal. App. 464, 466, and authorities cited in last cited case.) No act of Lyon or of any subsequent owner of said real property could affect or in any way alter this right of the Magills without their consent.
>
> A. H. Magill, being a surety on said note, even though he was the original principal thereon, upon paying said note under compulsion, or voluntarily acquiring the same by assignment was subrogated to all rights of the bank in and to said note.

(Beach v. Waite, 21 Cal. App. 304, 307; Vincent v. Garland, 86 Cal. App. Dec. 5.) By right of subrogation, or as the owner of said note by written assignment from the bank, Magill could proceed against all persons liable for the payment of the balance due on said note. The acquiring of an obligation by the surety does not extinguish the obligation, but the same remains in full force and effect in so far as the rights of the surety to recover from third parties liable upon the obligations are concerned. The bank then is in error in contending that the pleadings and evidence show no right of recovery exists in favor of Magill. Magill, not only had the right to pursue any endorser of said note who was personally liable for the balance due thereon, *but he was entitled to any existing securities given for the purpose of securing payment of said promissory note.* No rule of law is more firmly established than that a surety upon payment of the principal obligation succeeds to all the rights of the principal in and to said obligation. (Secs. 2848 and 2849, Civ. Code; 23 Cal. Jur., p. 1078.)"

Accordingly, the court affirmed the judgment in Magill's favor against the bank *for the recovery of the stock pledged by Lyon to secure the note.*

In our case Abraham is Magill and the San Francisco Iron & Metal Company is Lyon and the stock is the bond of the Century Indemnity Company and the bank is the Goodyear Redwood Lumber Company, Berges' assignor.

So the State Supreme Court has now established the law of the state in accordance with the decision of

the Circuit Court of Appeals in our case and petitioner has no ground left for complaint.

Doubtless the decision of the State Supreme Court convinced the Circuit Court of Appeals all the more firmly that its refusal to notice petitioner's claim of unassigned plain error did not do petitioner any injustice.

We respectfully submit, therefore, that the petition should be denied.

Dated, San Francisco, California,
September 15, 1937.

JOE G. SWEET,
Counsel for Respondent.

HADSELL, SWEET, INGALLS & LAMB,
D. HADSELL,
Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY
(a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

REPLY BRIEF FOR RESPONDENT.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY
(a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

REPLY BRIEF FOR RESPONDENT.

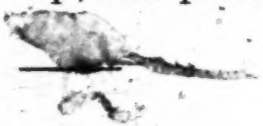
PRELIMINARY STATEMENT.

The expense to date in the several trials and appeals in this case has already become so large in relation to the amount involved that it is not possible to send counsel to Washington or employ counsel there to argue this case orally, as should be done. For this reason we have found that this written presentation of our case must needs be more explicit, and hence longer, than otherwise it should be.

I.

HISTORY OF CASE.

This case has been tried and appealed twice and now is before this court for the second time on petition for writ of certiorari. On the first trial judgment went to defendant, the present petitioner. The Circuit Court of Appeals reversed this judgment with directions. (65 Fed. (2d) 765.) The defendant petitioned this court for a writ of certiorari. The petition was denied. (*Century Indemnity Co. v. Nelson,* Oct. Term, 1933, No. 456, 290 U. S. 683, 78 L. Ed. 588.) On retrial judgment went for plaintiff, respondent here. Petitioner appealed and the judgment was affirmed. (90 Fed. (2d) 644.) Thence the case is here again in the present proceeding.



II.

RESPONDENT'S STATEMENT OF THE CASE.

Petitioner's statement of the case is so very incomplete that it fails to give the court a correct view of the issues, the points decided, and the meaning of the last decision by the Circuit Court of Appeals. We therefore restate the case.

One Berges, as assignee of Goodyear Redwood Lumber Co., brought an action against N. Abraham, H. Silberman and L. Silberman individually and as co-partners doing business under the name of N. Abraham Mercantile Company, and against San Francisco Iron & Metal Company. (R. 36.) Writs of attachment were issued and property, credits and

effects of each of these defendants "in excess of the value of $6000.00 for each of said defendants" were attached. (R. 36.) Abraham gave a bond of Fidelity and Casualty Company of New York in release of the attachment on his "property, credits and effects" (R. 47-48) and the Silbermans and San Francisco Iron & Metal Company jointly gave the bond of petitioner, Century Indemnity Company, in release of the attachment on their respective properties, credits and effects. (R. 36-39.) These last defendants and the Century Indemnity Company then stipulated with the plaintiff Berges:

> "That for the purposes of said bond the plaintiff has, before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6000.00 each." (R. 40-41.)

The importance of this stipulation will appear a little later.

The pleadings, findings and judgment in *Berges v. Abraham, et al.,* are very important.

These documents were introduced into evidence and appear at pages 58-93 of the record. Four causes of action were stated in the original complaint. An important paragraph on which we rely was not in the original complaint. This paragraph was added later as an amendment to all four causes of action. (R. 66.) It was made paragraph IV-a of the first cause of action, II-a of the second, II-a of the third, and II-a of the fourth. The answer of the Silbermans and San Francisco Iron & Metal Company de-

nied this particular paragraph in each instance. (R. 69-71.) (See last paragraph in each numbered paragraph of the answer I to IV inclusive.) So this allegation was one of the issues in the case. Hence the court in that case was not only justified in making a finding on this issue but was required to make a finding on it. That finding was (R. 84-85):

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, *agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham,* L. Silberman and San Francisco Iron & Metal Company, a corporation, *individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company;* that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, *received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman* and San Francisco Iron & Metal Company, a corporation, individually *and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company,* and in consideration thereof and other valuable considerations, *specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company,* but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

The trial court in *Berges v. Abraham, et al.*, made separate fiindings for each of the four counts in the

complaint; and this finding is incorporated in every one of them. (R. 84, 87, 88 and 89.)

The judgment then says (R. 91):

> "This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties the court made and filed its findings of fact and conclusions of law."

The judgment then proceeds:

> "*Pursuant thereto*"—that is, pursuant to such *findings of fact* and conclusions of law—"it is hereby ordered adjudged and decreed" (R. 91-92):
>
> "1. That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, *individually and as joint adventurers and as co-partners* doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $112.40."

So the judgment was based on the findings as drawn and approved.

Therefore, in *Berges v. Abraham, et al., first,* the plaintiff, Berges, as ground for recovery against *all* defendants, relied upon the allegation that San Francisco Iron & Metal Company had assumed the obligation of the other defendants to the plaintiff's assignor and had received certain assets and had agreed to apply such assets in settlement of the obligation and, *second,* Berges' allegation to such effect

was denied and, *third,* the court found Berges' allegation true and, *fourth,* the court rendered judgment in Berges' favor against the defendants *on that basis. Thereby the court tried out and decided what were the mutual relations between the defendants in respect of the claim of Berges' assignor.*

When judgment in the *Berges* case became final respondent Nelson, using funds supplied by Fidelity and Casualty Company of New York, purchased the judgment and Berges assigned the judgment to Nelson who holds it in trust. The judgment has never been paid. (R. 42.)

Meanwhile San Francisco Iron & Metal Company went into bankruptcy. Nelson filed a claim in the bankruptcy proceedings for payment of the judgment. The bankruptcy matter is still pending. No payment on the claim has been made. (R. 43.) On the trial below Nelson tendered to Century Indemnity Co., and delivered to the clerk of the trial court for petitioner's benefit and use upon payment of the judgment in this case, an assignment of this claim against the bankrupt's estate. (R. 48.)

As Century Indemnity Co. refused to pay the judgment, so assigned to Nelson, this action was brought on the bond on release of attachment which Century Indemnity Co. had given on behalf of Silbermans and San Francisco Iron & Metal Company. Nelson seeks to recover the full amount.

This claim for the full amount of the judgment (principal, costs and accumulating interest), is founded upon the proposition that, as among Abra-

ham, the Silbermans and San Francisco Iron & Metal Co., the *latter* had assumed and agreed to pay their obligation to Goodyear Redwood Lumber Co., the assignor of Berges, and had received practically all the assets of the four defendants as co-adventurers and in consideration therefor had obligated itself to apply these assets to liquidation of their obligation, and that in consequence Abraham, and therefore Abraham's surety on his bond in release of attachment, namely, Fidelity & Casualty Company of New York, should be fully protected against the judgment. Therefore Abraham's surety could purchase the judgment and, as assignee thereof and hence a judgment creditor, could sue on the bond in release of attachment which Century Indemnity Co. had executed on behalf of *San Francisco Iron & Metal Co.*

On the first trial the *entire* judgment roll in *Berges v. Abraham, et al.* was introduced into evidence over defendant's objection. (R. 45 on petition to this court for writ of certiorari on reversal of judgment on first appeal—Oct. Term 1933 No. 456.) However, the bill of exceptions on that appeal only included the findings, conclusions of law and judgment. The pleadings (which, however, are in the record on the second appeal) were omitted. (Pages 45-57 in said No. 456.)

So the record on that appeal included *verbatim* the finding in the *Berges* case which we have quoted in full at page 4 of this brief. (R. 49, Oct. Term 1933, No. 456, supra.)

On the first appeal the Circuit Court of Appeals, after reviewing the case, laid down these principles

for the solution of the controversy (65 Fed. (2d) 765 at 768):

(1) "According to the findings of fact in the Superior Court action the corporation, San Francisco Iron & Metal Company, which is alleged to be one of the copartners, together with L. Silberman, H. Silberman, and N. Abraham, acting under the firm name of N. Abraham Mercantile Company, was originally jointly liable for the indebtedness sued upon. N. Abraham Mercantile Company, the copartnership, transferred all the property of the copartnership to the corporation in consideration of an agreement on the part of the corporation to pay all the debts of the former partnership. This agreement would constitute the corporation a principal and the members of the copartnership and the copartnership sureties. Davis v. Heimbach, 75 Cal. 261, 17 P. 199; Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Imperial Refining Co. v. Kanotex Refinery Co. (C. C. A.), 29 F. (2d) 193, 199. *If, therefore, the property seized by the sheriff was the property of the corporation, justice would require that this property be first subjected to the payment of the judgment for which the corporation was primarily liable before the property of N. Abraham, one of the partners for which appellant is surety, or of the other partners, is applied to the judgment, although the corporation is only a co-judgment debtor upon the face of the judgment.*"

* * * * * * *

(2) "*If it should appear from the evidence upon a new trial that there was sufficient property of the San Francisco Iron & Metal Company seized by the sheriff to satisfy the judgment,* then

the appellant surety, representing the rights of a joint debtor who was in law a surety on the obligation of that corporation, *would be entitled to enforce the entire judgment* against the property of the corporation and therefore against the bond issued to release the property of the corporation."

* * * * * * *

(3) "If, on the other hand, the property of the corporation thus released is insufficient to pay the judgment, the plaintiff would be entitled to have the value thereof first applied to the judgment and as to any balance thereon to have one-half of the remainder thereof paid by L. Silberman and the enforcement of the payment of that portion of the judgment against the undertaking of the appellee executed on his behalf."

Then the court said:

"The judgment, however, must be reversed, and the case remanded for further proceedings not inconsistent therewith."

As stated, petition to this court for a writ of certiorari was denied and the case went back to the District Court for a second trial.

Now the complaint alleges that in the *Berges* case a "writ of attachment was issued and levied against the property, credits and effects of the defendants San Francisco Iron & Metal Company, a corporation, and L. Silberman" and that thereafter "certain property, credits and effects of *each* of said defendants in excess of the value of $6000.00 were attached". (R. 2.) The answer denies this allegation. (R. 12.) But

the complaint further alleges the making of the stipulation between Berges, the Silbermans & San Francisco Iron & Metal Co. and Century Indemnity Co.

> "That for the purpose of said bond the plaintiff has before February 14, 1929 attached property, credits and effects of *each* of said four defendants of the then value of $6000.00 *each.*" (R. 6.)

Please note the effect of the word "each" at the end of this stipulation. Century Indemnity Co. admits the execution of this stipulation. (Answer, R. 12.) The trial court on the retrial therefore found (R. 36):

> "* * * that thereupon in said action a writ of attachment was issued and levied against the property, credits and effects of the defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, and L. Silberman, as security for the satisfaction of any judgment that might be recovered by plaintiff V. Berges; and certain property, credits and effects of *each* of said defendants in excess of the value of $6,000.00 for *each* of said defendants were attached and seized by the Sheriff of the said City and County of San Francisco pursuant to said Writ of Attachment."

Thereby the plaintiff (Nelson) had complied with the rule laid down in this case by the Circuit Court of Appeals that:

> *"If it should appear from the evidence upon a new trial that there was sufficient property of the San Francisco Iron & Metal Company seized by the sheriff to satisfy the judgment,* then the appellant surety, representing the rights of a

> joint debtor who was in law a surety on the obligation of that corporation, *would be entitled to enforce the entire judgment against the property of the corporation and therefore against the bond issued to release the property of the corporation.*"

So judgment necessarily went for plaintiff against defendant.

On the second trial the complete judgment roll (pleadings, findings, conclusions of law and judgment) in *Berges v. Abraham, et al.*, were again introduced in evidence over defendant's objection. (R. 53-93.)

On the second trial, in an attempt to overcome the finding in *Berges v. Abraham, et al.* that San Francisco Iron & Metal Company had assumed the payment of the claim of Berges' assignor, the defendant introduced the testimony of one of the Silbermans. (R. 119-130.) But the testimony of this witness really destroys petitioner's case.

Silberman testified, as questioned by petitioner (R. 129):

> "Q. If I understand your testimony correctly a few minutes ago you said *in the dissolution of your partnership that the San Francisco Iron & Metal Company agreed to pay the obligations of the partnership, is that correct?*
>
> A. *I did.*"

Thereby Silberman proved one of the main points in the crucial finding in *Berges v. Abraham, et al.*

Silberman went further. He said (R. 122):

"The partnership assumed all the indebtedness when it was merged with the corporation."

In other words, at the time when the corporation assumed all the debts of the partnership (his testimony, supra) the partnership was merged in the corporation. That meant just one thing, namely: *that the corporation took over all the assets of this partnership.* Thereby Silberman proved another of the main points in the crucial finding in *Berges v. Abraham, et al.*

Now it is true that Silberman did say that San Francisco Iron & Metal Company did not assume the obligation to Berges' assignor. But by the rest of his testimony he gave himself the lie direct.

Silberman testified that the rails which had been purchased from Goodyear Lumber Company were already in Abraham's possession when the partnership was formed. (Page 123.) So the obligation to pay for the rails had been incurred by Abraham before the partnership between Abraham, Silberman and San Francisco Iron & Metal Company had been formed.

Then what happened? Silberman said (page 123):

"When I came back I got into a discussion with N. Abraham and the steel rails were on hand at that time. I did not know where they came from, *but I learned where they came from. He told me where they had come from. I went over whatever assets he had and I found those rails were among the assets.* Also among the assets were a lot of army goods, tents, cots, mattresses,

and these were taken over. He had on hand some uncollected accounts *and these were taken over too* and subsequently, I think, the partnership collected some of those unpaid accounts."

(Page 124):

"We took over *all the assets of N. Abraham* and that included the book accounts."

(Page 124):

San Francisco Iron & Metal Co. "*did participate* in paying liabilities of the partnership. Outside of the Goodyear Redwood Lumber Co. *the San Francisco Iron & Metal Co. paid various liabilities of the partnership;* the amount I could not say."

Yet, despite this testimony, Silberman had the colossal nerve to tell the trial court that the partnership did not assume any of Abraham's antecedent debts.

That is—the partnership acquired *all* the assets of N. Abraham, including the steel rails bought from the Goodyear people and including *all* Abraham's uncollected book accounts, but did not assume any of Abraham's liabilities! That is, Abraham was stripped of his assets but was left with his liabilities!

But Silberman was not so sure that the partnership had not assumed the *Goodyear* claim. He said also (page 127):

His (Silberman's) brother "told me about the claim of the Goodyear Redwood Lumber Company after the claim was made; he just told me there was a claim of the Goodyear Redwood Lum-

ber Company. As to what I did about it with Abraham, well *I don't remember.* I really think that Abraham said he would take care of it, *but I really don't know, it is quite a while ago.*"

And he gave that testimony despite the fact as he said (R. 127):

"I refreshed myself yesterday; I read over the deposition that was taken to refresh my memory."

If he was still uncertain after refreshing his memory with former testimony, the only explanation is that he didn't dare say, flat-footedly, that this claim had not been assumed when the partnership acquired all the tangible and intangible assets of N. Abraham.

Further on page 127 of the record he said:

"I can't give you the exact date of this arrangement with Abraham; it was sometime in November, 1926. At that time I went over the books and pages and as to finding current bills on hand I did find some small bills, yes. *I really don't know* whether those small bills were paid by the partnership or not. I think Mr. Abraham took care of those personal bills himself. I really would not say *but I know they were taken care of.*"

Again, we say, the witness was afraid to state that the partnership had not assumed and paid these bills.

This lack of candor in the witness and his failure to remember even after he had refreshed his memory, combined with his square testimony that the partnership had acquired *all* the assets of N. Abraham, are

sufficient to convince all that the partnership did assume Abraham's obligations, too.

We called this testimony to the attention of the Circuit Court of Appeals on this second appeal and in reference thereto that court in its first opinion said (R. 163):

> "This evidence alone was sufficient to support the implied conclusion of the trial court that the San Francisco Iron & Metal Company had assumed the obligations of the copartners. It is clear that the judgment and findings in action No. 204,668 are conclusive that the indebtedness sued upon was that of the partnership. It is therefore of no importance whether the findings in the superior court No. 204,668 relative to the assumption of the entire debt by the San Francisco Iron & Metal Company is conclusive upon the parties to the action. We may assume as appellant contends that without additional evidence it is not."

Plainly the court was right; just as the trial court was right when its finding here, based both upon the judgment-roll in *Berges v. Abraham, et al.*, and upon Silberman's testimony, followed the crucial finding in that case.

Furthermore, Silberman's testimony showed that finding IV-A (the crucial finding on which we rely) was material to the judgment in the *Berges* case. For Silberman said that the Goodyear claim was an obligation of Abraham prior to the formation of the partnership and that the San Francisco Iron & Metal Company assumed only the obligations of the partnership.

If that were true then the judgment in the *Berges* case against Silberman and San Francisco Iron & Metal Company was erroneous and should have been against Abraham exclusively. Therefore material issues in the case plainly were (a) whether the Goodyear claim was originally against the partnership; (b) whether that claim was originally only against Abraham but had been assumed by the partnership; and (c) whether the claim was only properly against Abraham. These issues involved the relations that then and previously had existed between the defendants. The trial court determined these issues in finding IV-A on which we rely. Hence that finding was material and was in order and the judgment properly reflected that fact when it recited that it was made "pursuant" to the findings.

III.

SUMMARY OF ARGUMENT.

A. Re first error specified.

1. Petitioner cannot raise this point because the bill of exceptions does not include any findings or conclusions proposed by petitioner. (Page 19.)

2. Petitioner itself deemed the trial closed before it attempted to submit any findings or conclusions; and petitioner acted accordingly. (Page 21.)

3. On submission of the case petitioner merely asked the court to make findings; petitioner did not ask for any special findings or submit any and request the court to make them. (Page 22.)

4. The "progress of the trial" had in fact concluded before petitioner had submitted any proposed or requested findings or conclusions. (Page 23.)

5. The authorities are entirely against petitioner on this point. (Page 25.)

6. The authorities cited by petitioner are not in point. (Page 33.)

B. Re second error assigned.

1. Circuit Court of Appeals refused to "notice plain error" because it considered that on the merits substantial justice had been done. (Page 36.)

2. "Plain error" will only be noticed where failure to notice it will result in serious injustice. (Page 38.)

3. By the law established on the first appeal there was no merit in petitioner's appeal. (Page 39.)

4. By a California case decided after the first decision on this appeal the law is settled in California against petitioner on the merits. (Page 39.)

5. The binding effect of the findings in *Berges v. Abraham* was decided adversely to petitioner upon the first appeal and has become the law of the case. (Page 41.)

6. The findings in *Berges v. Abraham* are binding upon petitioner because (a) an examination of the record in that case shows that the court there decided the relationships among the defendants (page 43); (b) the action here is founded upon the judgment in *Berges v. Abraham* and is not a collateral proceeding among the defendants in that case (page 49); (c) the

testimony of one of the defendants, produced by petitioner, confirms the findings. (Page 50.)

C. Judgment is supported by findings and conclusions.

1. In law San Francisco Iron & Metal Co. became principal and Abraham became surety. (Page 52.)

2. In law Fidelity & Casualty Co. of N. Y. and Century Indemnity Co. were not co-sureties. (Page 52.)

3. The undertaking of petitioner was that there would be applied to any judgment for plaintiff in *Berges v. Abraham* the very assets which San Francisco Iron & Metal Company had agreed to apply in liquidation of Berges' claim. (Pages 53.)

4. It was petitioner's undertaking that released such assets from attachment and permitted their loss through the bankruptcy of San Francisco Iron & Metal Co.

5. The authorities amply support the judgment as based upon the findings and conclusions. (Page 56.)

IV.

FIRST ERROR SPECIFIED.

The complaint is that substantial prejudice resulted to petitioner by the refusal of the Circuit Court of Appeals "on technical grounds of procedure" to review "the actions and rulings on the findings and conclusions".

The Circuit Court of Appeals said (R. 169-170):

> "Many of the Indemnity Company's assignments of error, and five of the seven specifications of error in its brief, are based upon the failure of the trial court to make certain special findings requested by the Indemnity Company. These assignments and specifications cannot be considered because the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial. Continental Nat'l. Bk. v. Nat'l. City Bk. of N. Y., 69 F. (2d) 312, 317, and cases therein cited."

The question in procedure then is—when did the progress of the trial end within the meaning of the statute? (28 U. S. C. A. Title 28, Sec. 875.)

First.

If we assume for a moment that petitioner is correct it avails petitioner nothing.

The bill of exceptions (R. 52-131) does *not* include any findings or conclusions proposed by petitioner. It is true that at pages 21-35 of the record there appears proposed Special Findings and Conclusions of Law which the document states are submitted by Century Indemnity Company "in lieu of those proposed by plaintiff". But this document is an "estray" for it is not included within the Bill of Exceptions. It is not even endorsed as "filed"—only as "lodged" (R. 35); but documents properly a part of the clerk's records are endorsed "filed", with the date, and not "lodged". (See all other documents in the record.)

Now any rulings "during the progress of the trial" on which an appellant wishes to found error must be incorporated in, and authenticated by, a bill of exceptions.

> "The rulings of the court *in the progress of the trial of the cause,* if excepted to at the time, *and duly presented by a bill of exceptions,* may be reviewed" etc.
>
> (Sec. 875 U. S. C. A.—Title 28.)

All the bill of exceptions does (R. 130-131) is to state that both parties prepared and lodged with the court proposed findings of fact and conclusions of law and that the court signed and filed the findings and conclusions prepared by respondent. As the findings and conclusions proposed by petitioner are not included in the bill they could not be considered on the appeal; and in consequence the Circuit Court of Appeals could not consider any error of the trial court in rejecting such findings and conclusions.

On this ground, then, findings and conclusions of law proposed by petitioner must be disregarded in any event, even though the Circuit Court of Appeals may have refused, on other and erroneous grounds, to give them any consideration.

Our position has been expressly approved in identical situations in these cases:

> *Davis v. United States,* 67 Fed. (2d) 737 (C. C. A.—10);
>
> *Greenway v. United States,* 67 Fed. (2d) 738 (C. C. A.—10);

Kolton v. United States, 67 Fed. (2d) 741 (C. C. A.—10),

and the authorities which these cases cite.

Finally these same cases also hold, quoting from the *Davis* case:

> "But the sufficiency of the evidence to support the findings must be appropriately raised by motion for judgment, request for declaration of law, or other like motion. Such a motion or request, and the ruling thereon, are not a part of the record proper, and must be presented by a proper bill of exceptions."

Numerous authorities from this court and various Circuit Courts of Appeal are cited. The bill of exceptions (R. 130-131) fails to show, properly of record, that any such thing occurred.

Second.

The very fact that petitioner failed to have its proposed findings and conclusions (whatever they were) inserted in the bill of exceptions is proof conclusive that *petitioner itself deemed the "progress of the trial" ended, either when the case was submitted or, at latest, when the trial court made its order for judgment.* (R. 21.) For in such case petitioner's proposed findings and conclusions, presented for consideration after progress of the trial had ended, should not and could not be incorporated in the bill of exceptions. Petitioner apparently felt they should not be included in the bill.

The bill of exceptions (R. 131) states this:

> "That all the material evidence for determination of this cause has been set forth herein, *as well as all proceedings on the trial thereof.*"

Since this is true and since the bill of exceptions does not contain any findings or conclusions proposed by petitioner it must be that any such findings or conclusions were not presented to the trial court "during the progress of the trial".

Third.

The bill of exceptions in the record read (pages 130-131):

> "Mr. Wisecarver (attorney for petitioner). I wish also at this time to make a motion for judgment *and findings.*
>
> Mr. Hadsell (attorney for respondent). We do the same on behalf of the plaintiff, for the full amount, and request findings.
>
> Thereafter, the case was orally argued before the court and *was submitted* upon written briefs. *Thereafter* and on June 1, 1934, and outside the presence of the parties, the Court made and entered its order *granting judgment to the plaintiff with findings to be submitted.* Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff.
>
> Thereafter and on June 16, 1934 the Court, without the presence of the parties, signed the

proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the court, and judgment was entered on said June 16, 1934."

The order of the trial court for judgment is at page 21 of the record and reads:

"This case having been heretofore heard and submitted and due consideration having been had, *it is ordered that judgment be entered for plaintiff*, with interest and costs, upon findings of facts and conclusions of law to be presented."

So, plainly the trial had been concluded with the submission for decision.

The court will note:

1. That petitioner's motion for findings did not specify any finding whatever that petitioner desired the trial court to make and that petitioner with its motion did not offer any findings;

2. That petitioner's motion as made was for "findings" *generally* and not for any "*special* findings" then and there offered;

3. That petitioner's motion did not specify, even generally, what petitioner thought or desired the purport of the findings should be and that the petitioner did not state any grounds for the motion.

The court further will observe that petitioner's challenge to the findings actually made comes by a single assignment of error filed after judgment (R. 138, Assignment No. 21) and directed only to one

finding, and that petitioner's challenge to failures to find come by other assignments numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20 and 24.

The court will also note from Rule 42 of the District Court (quoted in full at page 5 of the Petition) that in this action the making of special findings of fact is "in the discretion of the court" and that the rule provides the procedure by which the trial court will exercise such discretion.

So it is important that there shall not be confused into one thing two very separate things, namely:

(a) a request for particular findings to a particular effect and in particular words—that is, a request that the court adopt findings that the party has formulated and submits to the court with the request; and,

(b) a request that when the trial court shall decide a case on the law side it shall exercise its discretion to make findings by directing that findings shall be made to conform to the court's decision.

To ask for a particular finding to a particular effect is one thing; to ask generally that the court make findings is quite another thing.

To ask the court to make a particular finding to a particular effect is like asking the court to give some specific instruction to a jury. When the request for the instruction is made the instruction must be submitted with the request. Otherwise the trial court does not err in failing or refusing to give the instruction.

So here. If, when petitioner asked the trial court to make findings, the petitioner wanted findings in particular words or to a particular effect, petitioner then and there should have presented the formulated findings that petitioner wanted the trial court to make. But petitioner did not do so. The trial then closed and the cause was submitted for decision as the record clearly states. There was no reservation made by either party of any right to offer or file proposed special findings in support of such party's motion for findings. The submission for decision was complete. The "progress of the trial" was done.

When the trial court, then, was considering the case after the parties' submission of the case for decision, *the court did not have before it for consideration any "special findings" whatever as requested by either party.* It was under these circumstances that subsequently, as the bill of exceptions states, "the court made and entered its order granting judgment to the plaintiff with findings to be prepared".

Very apposite to our case are the words of this same Circuit Court of Appeals in a case decided some weeks later than the first decision on the present appeal—*Lando v. Equitable Life Assur. Soc.*, 84 Fed. (2d) 640. Justice Denman, who dissents here on one phase of our case, there said for the court:

> "A jury was properly waived, and prior to the submission of the case the insured appellant moved for judgment in his favor and also moved for special findings. *Appellant did not specify the ultimate facts desired to be found. His mere*

motion that the court make findings one way or another as to the ultimate facts is not a request for findings of specific facts sufficient in itself to warrant a review of the evidence. Seaboard Surety Co. v. U. S., 84 F. (2d) 348, decided by this court on June 8, 1936. So far as advising the lower court of the claim that the evidence required a judgment in his favor, the situation is the same as if the appellant had made no more than a motion for such a judgment."

See reference to this case in note to the court's second opinion here. (R. 170.)

Mr. Paul P. O'Brien, Clerk for the Circuit Court of Appeals for the Ninth Circuit, published in 1929, for the help of attorneys conducting appeals, a book entitled "Manual of Federal Appellate Procedure" (Second Edition) to which he also publishes cumulative supplements. In the "1937—Cumulative Supplement", dated September 1, 1937, he states at pages 9-10:

"A request for judgment, or for a declaration of law or for special findings of fact and conclusions of law, made after the case has been submitted, and the trial judge has announced his decision, but before formal judgment has been entered, comes too late and is not made 'during the progress of the trial' as required by Par. 700 R. S. (28 U. S. C. A. Sec. 875). It is essential that such motions me made at or before the submission of the cause for decision, both in a case submitted upon an agreed statement of all the ultimate facts, as well as in cases tried by the court without a jury."

His citations are:

Continental Bank v. National City Bank etc. (C. C. A. 9), 69 F. (2d) 312;

Babbitt Bros. Trading Co. v. New Home Sewing Machine Co. (C. C. A. 9), 62 F. (2d) 530, 536, concurring opinion of Wilbur, C. J.;

Columbia Nat. Life Ins. Co. v. Griffith (C. C. A. 8), 73 F. (2d) 244, 248;

Sanfeliz v. Bank of Nova Scotia (C. C. A. 1), 74 F. (2d) 338;

Huron College v. Union County Trust Co. (C. C. A. 8), 77 F. (2d) 609;

Inland Irving Nat. Bank of Chicago v. American Flange and Mfg. Co. (C. C. A. 7), 75 F. (2d) 553;

First Nat. Bank of San Rafael v. Philippine Corp. (C. C. A. 9), 51 F. (2d) 218;

Lando v. Equitable Life Ass. Society of U. S. (C. C. A. 9), 84 F. (2d) 640;

Armstrong v. Metropolitan Life Ins. Co. (C. C. A. 8), 85 F. (2d) 185, and the present case of

Century Indemnity Co. v. Nelson (C. C. A. 9).

Of these cases *Continental Bank v. National City Bank etc.* (C. C. A. 9), 69 Fed. (2d) 312, is an important case. Judge Mack of New York, wrote the opinion for the court, saying:

> "Nevertheless, *the question remains whether or not rulings made and exceptions thereto taken, not merely after submission of the case, but even after the announcement by the court of its opinion and intended judgment, but before rendition*

of the final judgment, are made and taken 'in the progress of the trial'. In the opinion in Edwards v. Robinson, supra (8 Fed. (2d) 726, 727—C. C. A. 9), an examination of the record discloses what is not entirely clear from the opinion, that there, as here, the declarations of law were requested some time *after* the judge had filed his opinion which concluded with the words 'the complaint will be dismissed'—but also some time *before* the trial judge signed and filed the actual judgment of dismissal and his own findings. This court there said that no motion or request for a finding in favor of plaintiff was made 'until long after the close of the trial, and not until 10 days after a decision in favor of the defendants had been announced by the court. Under such circumstances, we are without jurisdiction to consider the sufficiency of the testimony to support the findings'. There are also expressions of opinion in other cases that, for these purposes, *the progress of the trial is concluded when the cause is submitted to the judge, or at least when he announces his decision.* See Babbitt Bros. Trading Co. v. New Home Sewing Machine Co., 62 F. (2d) 530, 535, 536 (C. C. A. 9th, 1932) (Judge Wilbur's concurring opinion); Merriam v. Huselton, 45 F. (2d) 983 C. C. 8th, 1930); United States v. Smith, 39 F. (2d) 851, 854 (C. C. A. 1st, 1930); Southern Surety Co. of Des Moines v. United States, 23 F. (2d) 55, 58 (C. C. A. 8th, 1927); Ewert v. Thompson, 281 F. 449, 450 (C. C. A. 8th, 1922). This interpretation accords with the function of the request for ruling and exception to the denial thereof; *it is to direct the judge's attention to the specific proposition of law relied upon, so that prior to the announcement of his conclusions*

he may have the opportunity to consider it. True it is that after entry, and until the end of the term during which the judgment has been entered, it may be set aside and a new trial granted or if tried without jury, a contrary judgment entered. That, however, is a matter entirely within the court's discretion, and offers no guide to the scope of the general rule. We conclude that there were no rulings 'in the progress of the trial', properly before us for review, other than that on the evidence hereinabove considered."

This decision was made for the Ninth Circuit long before the second trial of our case and was therefore available as a guide to petitioner on such trial.

Thereupon the Continental National Bank petitioned this court for a writ of certiorari in a cause entitled *Continental National Bank v. National City Bank of New York,* and numbered 34 in October Term, 1933. The petition was denied. (293 U. S. 557, 79 L. Ed. 659.) One of the reasons specifically urged for the petition was that the decision of the Circuit Court of Appeals on the question in procedure, as above quoted, "is untenable and in conflict with the decision of another Circuit Court of Appeals on the same matter and in conflict with the weight of authority". (See Pet. page 11.) Said petitioner:

"This case having been tried before a judge, without a jury, on a stipulation of facts spread at large upon the record and having special findings of fact and conclusions of law signed incorporating such stipulation of facts, the Circuit Court of Appeals erroneously refused to review the facts to ascertain if the same supported the

judgment, because of an alleged failure to request a declaration of law *prior to the minute order for judgment.*" (Citing cases.)

Also (page 12):

"If such request for a declaration of law were necessary, then timely application therefor was made by petitioners as such application was made before final judgment and in the same term of court." (Citing cases.)

This reason for the petition was stated also in the specifications of errors (Pet. page 21) and at pages 33-36 of the petition authorities and argument are presented for the contention. The respondent filed a brief in opposition to the petition wherein at pages 19-23 respondent distinguished or discounted petitioner's authorities and cited many authorities against petitioner's contention. Therefore we would urge upon the court that its denial of the petition was in effect an affirmance of Judge Mack's opinion and is decisive against the petitioner in the present proceeding.

We fortify this conclusion with what this court itself, in *Arthur C. Harvey Co. v. Malley,* 288 U. S. 415, 418, 77 L. Ed. 866, 867, approved as rightly said in that case by the Circuit Court of Appeals for the First Circuit:

"Exceptions, *following an order of judgment,* to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, *are not rulings in the course of the trial.*"

So here—exceptions to findings proposed by respondent and adopted by the court *after* the order for judgment for respondent was made "are not rulings in the course of the trial"; and the same is true of exceptions to the trial court's rejection of findings proposed by petitioner (appellant) *subsequent* to the order for judgment.

The specific order of the court in our case was that "judgment be entered for plaintiff * * * upon findings of fact * * * to be presented". Thereby the court had determined what the findings should do; namely, that the findings should find the facts as respondent contended them to be and as entitled plaintiff to judgment. In effect the trial court had then ruled on the facts and the law and the trial had then ended in any event—even if the trial had not ended previously when the parties had unreservedly submitted the cause for decision. All that remained to be done was to formulate findings that should comply with the trial court's order for judgment. There was to be no further "trial".

Rule 42 of the District Court does not help petitioner. *The purpose of that rule was not to extend the trial but simply to provide a means whereby the trial court would secure aid in formulating findings expressive of a decision already rendered.* The Circuit Court of Appeals very properly so held in its last opinion for the reasons there stated. (R. 170, Note 1.)

This view of the rule is embodied, in effect, in O'Brien's 1937 Supplement where he states at page 9:

"The making of special findings of fact in an action at law, tried by the court, on the waiver of a jury, is discretionary with the trial court, and its action in making such findings, in refusing to make requested findings, or in refusing to amend findings made, is not subject to exception, or to a subsequent review in a federal appellate court",

and cites:

Denver Live Stock Com. Co. v. Lee (C. C. A. 8), 18 F. (2d) 11, 16;

Modoc County Bank v. Ringling (C. C. A. 9), 7 F. (2d) 535, 536;

Kansas Society Life Ins. Co. v. Shirk et al. (C. C. A. 10), 50 F. (2d) 1046.

Later, at page 11, O'Brien states:

"If a party seeks to have reviewed the question whether the record contains any substantial evidence to support the findings and judgment against him, it is incumbent upon him to make a motion for judgment in his favor on that ground, or to request a declaration of law to that effect, or to take some other equivalent step, and secure a ruling by the trial court, and to take exception to such ruling (and include the same in bill of exceptions)",

and cites to his statement:

Federal Intermediate Credit Bank of Omaha v. L'Herisson (C. C. A. 8), 33 F. (2d) 841, 843;

Lyle v. Phillips Petroleum Co. (C. C. A. 8), 72 F. (2d) 347;

Fidelity & Deposit Co. of Maryland v. U. S. ex. rel. Woods (C. C. A 9), 72 F. (2d) 828;
Mittry Bros. Const. Co. et al. v. U. S. etc. (C. C. A. 9), 75 F. (2d) 79.

See, also,

Huron College v. Union County Trust Co. (C. C. A. 8), 77 F. (2d) 609;
McLaughlin v. Pac. Lumber Co., 293 U. S. 351, 55 S. Ct. 219, 79 L. Ed. 423;
U. S. v. Martin, etc. (C. C. A. 10), 80 F. (2d) 460;
Century Furniture Co. v. Bernhard's Inc. (C. C. A. 9), 82 F. (2d) 706;
Lando v. Equitable Life Ass. Society of U. S. (C. C. A. 9), 84 F. (2d) 640.

Plainly petitioner had not complied with any of these requirements.

The cases cited by petitioner are not against us.

In *Alexander v. Machan*, 147 U. S. 72, there were sixteen exceptions to findings and thirty-five exceptions to refusals to find; and the statement of this court, as quoted from that case by petitioner, is qualified by the clause "and an exception be taken". But the court's opinion does not say what the procedure should be and the report does not disclose what the actual procedure was. So the opinion is of no help here.

The case of *Mercantile Trust Co. v. Wood*, 60 Fed. 346, is in our favor because it says, as quoted by petitioner:

> "The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed the trial is ended. *Exceptions to the findings* or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with it, *avail nothing.* They are as futile as exceptions to the verdict of a jury."

So exceptions to the findings in our case "avail nothing".

Neither does *U. S. F. & G. Co. v. Board of Commissioners,* 145 Fed. 144, aid petitioner. The same judge wrote the opinion there as wrote the opinion in *Mercantile Trust Co. v. Wood,* supra, and cited the earlier case, with others, as deciding

> "The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

But, for the reason that the trial is ended when the findings are filed, there cannot be any exception to the findings as the exception does not occur "during the progress of the trial". Nor, after findings filed, can there be any exceptions to any failures to make findings; for the trial is ended and such exceptions come too late.

Petitioner's fourth case, *Thompson-Starrett Co. v. La Belle Iron Works,* 17 Fed. (2d) 536, is also favorable to us rather than to petitioner. The quoted language:

> "It seems to us a needless and idle form to require the party aggrieved to request a ruling that putative future findings, *or special findings already made,* are without any evidence, and we regard an exception *taken on that ground before final action of the court* an exception to rulings made 'in the progress of the trial' "

only means that it is sufficient, where special findings have already been made, to except, *before final action of the court,* on the ground that such findings are without evidence. But when findings have been filed final action has been taken and an exception comes too late—the very thing that has happened in our case.

The correct procedure was forcibly stated by this court in *Fleischmann C. Co. v. U. S.,* 270 U. S. 349, 70 L. Ed. 624, in these words:

> "To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, *or present the propositions of law to the court and obtain a ruling on them.* Norris v. Jackson, supra, 129 (9 L. Ed. 609); Martinton v. Fairbanks, 112 U. S. 673, 28 L. ed. 863, 5 Sup. Ct. Rep. 321. That is, as was said in Humphreys v. Third Nat. Bank, 21 C. C. A. 538, 43 U. S. App. 698, 75 Fed. 855, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. *In*

this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits'."

Petitioner failed completely to follow these requirements.

V.

SECOND ERROR SPECIFIED.

The claim is that, despite insufficiency of assignments and specifications of error, there is such "plain error" in the record that the Circuit Court of Appeals, in ~~its~~ *second* opinion on this appeal, should have passed on the merits and should have reversed the judgment.

(a)

Petitioner admits (Pet. pages 6-7) that the Circuit Court of Appeals, in its *first* opinion on this present appeal, decided the merits of the case against petitioner. Petitioner states:

"Notwithstanding a technical outlook on the procedural aspect of the case the Circuit Court of Appeals commented on the merits of the appeal and concluded that the judgment possessed evidentiary support (R. 163); that the judgment was supported by the findings of fact (R. 162); that the judgment was not contrary to the law of the case (R. 162); and that there was no error in the rulings on evidence (R. 162). *It saw no occasion to notice plain error (R. 164).*"

If, then, the Circuit Court of Appeals had, in its *second* opinion, gone again into the merits there is no reason to believe that the result would have been any different.

Why the Circuit Court of Appeals refused, in its *second* opinion, to go into the merits is clear enough.

For the *first* opinion, while finding sufficient defects in the record to dispose of the appeal on technical grounds alone, nevertheless gave consideration to the merits also (R. 162-164) and then concluded:

> "There is, therefore, no reason for relaxing our rule with reference to the specifications of error and there is no basis for relaxing the rule with reference to assignments of error as should be done only in case of a plain error unassigned (rule 11) *and so clearly prejudicial as to result in injustice.* In re Morgan (C.C.A. 6), 26 F. (2d) 183; Mutual Life Ins. Co. v. Parkinson (C.C.A. 6), 72 F. (2d) 759."

That is, in the court's view, any refusal of the court to recognize unassigned (or insufficiently assigned) plain error on this appeal would not be "so clearly prejudicial as to result in injustice". When, therefore, the court in its *second* opinion concluded (as it had already concluded in its first opinion) that the errors on which petitioner really relied were not assigned, or were not sufficiently assigned, it had no reason to go further to examine the merits under any claim of "plain error unassigned". When the two opinions are taken together they must be deemed to

hold that on this appeal the court would not overlook failures in assignments and specifications and go into the merits of the case on the basis of unassigned plain error—all for the reason that refusal to do so was not "so clearly prejudicial as to result in injustice".

(b)

Unassigned plain error will only be noticed where refusal to do so will be "so clearly prejudicial as to result in injustice".

In re Morgan, 26 Fed. (2d) 183 at 184;

Mutual Life Ins. Co. v. Parkinson, 72 Fed. (2d) 759 at 760;

Mahler v. Eby, 264 U. S. 32 (68 L. Ed. 549 at 557);

Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811.

The question then is:

Would that be the case here?

In its first opinion the Circuit Court of Appeals unanimously answered "no". After rehearing it maintained its stand by majority vote.

Even the dissenting opinion on the second decision on this appeal does not say that the merits of the case should be otherwise decided than on the first decision on this appeal. Mr. Justice Denman simply contends that the decision on the rehearing should be on the merits and not on technical procedure. For in his view there were sufficient assignments to justify that course.

(c)

In our statement of the case we have shown that on the first appeal the Circuit Court of Appeals clearly declared the principles that should govern the decision of this case. On the retrial the parties did two things—*first*, they introduced the *entire* record from the first trial (R. 56-119) and *second* the defendant (petitioner here) introduced the testimony of one of the Silbermans. (R. 119-130.) The testimony of Silberman was the only new evidence. We have already analyzed his testimony and have noted what the Circuit Court of Appeals said about it. (This brief pages 11-16.) What Silberman had to say has not changed the essential facts. The law established for the case on the first appeal controls on this appeal. Respondent on the retrial provided, through the stipulation of petitioner itself, the facts which brought the case within the principles enunciated by the Circuit Court of Appeals on the first appeal. Hence there is no error, much less a plain error, in the affirmance of the judgment on this appeal.

(d)

The second decision on this second appeal was rendered June 7, 1937. Petitioner promptly filed a petition for another rehearing and respondent replied. In our reply we called the attention of the Circuit Court of Appeals to a case decided by the Supreme Court of California on June 28, 1937, entitled *Sanders v. Magill,* 94 Cal. Dec., page 34, where that court fully confirmed our position. There Magill executed a note

for $15,000.00 to a bank which he secured by a deed of trust upon real property. Later Magill transferred the property to one, Lyon, who, by Magill's deed to him, assumed and agreed to pay the encumbrance. At a later date Lyon endorsed and guaranteed the note at the bank and also pledged with the bank certain shares of stock which became the subject matter of the suit. The court said:

> "By this transaction, Lyon became the principal and the Magills the sureties of said note. (Braun v. Crew, 183 Cal. 728; Williams v. Naftziger, 103 Cal. 438, 440; Tompkins v. Powers, 106 Cal. App. 464, 466, and authorities cited in last cited case.) No act of Lyon or of any subsequent owner of said real property could affect or in any way alter this right of the Magills without their consent.
>
> A. H. Magill, being a surety on said note, even though he was the original principal thereon, upon paying said note under compulsion, or voluntarily acquiring the same by assignment was subrogated to all rights of the bank in and to said note. (Beach v. Waite, 21 Cal. App. 304, 307; Vincent v. Garland, 86 Cal. App. Dec. 5.) By right of subrogation, or as the owner of said note by written assignment from the bank, Magill could proceed against all persons liable for the payment of the balance due on said note. The acquiring of an obligation by the surety does not extinguish the obligation, but the same remains in full force and effect in so far as the rights of the surety to recover from third parties liable upon the obligations are concerned. The bank then is in error in contending that the pleadings and evidence show no right of recovery exists in favor of Magill.

> Magill, not only had the right to pursue any endorser of said note who was personally liable for the balance due thereon, *but he was entitled to any existing securities given for the purpose of securing payment of said promissory note.* No rule of law is more firmly established than that a surety upon payment of the principal obligation succeeds to all the rights of the principal in and to said obligation. (Secs. 2848 and 2849, Civ. Code; 23 Cal. Jur., p. 1078.)"

Accordingly, the court affirmed the judgment in Magill's favor against the bank *for the recovery of the stock pledged by Lyon to secure the note.*

In our case Abraham is Magill and the San Francisco Iron & Metal Company is Lyon and the stock is the bond of the Century Indemnity Company and the bank is the Goodyear Redwood Lumber Company, Berges' assignor.

So the State Supreme Court has now established the law of the state in accordance with the decision of the Circuit Court of Appeals in our case and petitioner has no ground left for complaint.

Doubtless the decision of the State Supreme Court convinced the Circuit Court of Appeals all the more firmly that its refusal to notice petitioner's claim of unassigned plain error did not do petitioner any injustice.

(e)

Petitioner asserts that the findings and judgment in *Berges v. Abraham et al.* were not binding among the defendants in that case and hence the finding in

the judgment roll that San Francisco Iron & Metal Company assumed the obligation of the other defendants to Berges' assignor cannot be used against petitioner in this case, surety though it was for San Francisco Iron & Metal Company.

We have shown already (this brief pages 3-6) that this particular finding did resolve an issue as among the defendants themselves in *Berges v. Abraham, et al.*

Moreover, this very point was strongly urged by petitioner to the Circuit Court of Appeals on the first appeal. (Appellee's Brief, pages 18-23.) The appellant (respondent here) contended, to the contrary, that the finding bound the defendants *inter sese* in the *Berges'* case. (Appellant's Brief, pages 18-27.) With these contentions before it the Circuit Court of Appeals ruled on the first appeal that San Francisco Iron & Metal Company had assumed the obligations of the other defendants to Berges' assignor and was therefore bound to save Abraham harmless—in consequence of which (as the court also held) the surety of Abraham (Fidelity & Casualty Company of New York, represented by Nelson) which had purchased the judgment from Berges was entitled to enforce that judgment against the San Francisco Iron & Metal Company and hence against its surety, Century Indemnity Co.

In other words, this question of the binding effect of the judgment in the *Berges* case as among the defendants therein themselves was decided adversely to

Century Indemnity Co. on the first appeal; and that decision is now the law of this case.

(f)

There are many other reasons why the defendants in the *Berges* case (and therefore their respective sureties) are bound by the findings and judgment therein as to the relationships among themselves.

In the original complaint paragraph I of the first count reads as follows (R. 59):

> "That at all times herein concerned defendants, N. Abraham, H. Silberman, L. Silberman and 1st Doe to 10th Doe were copartners doing business under the name of N. Abraham Mercantile Company; that at all times herein concerned defendant, San Francisco Iron & Metal Company, was a corporation duly organized and existing under and by virtue of the laws of the State of California."

The court will carefully note that not one word is here said about the relation, if any, between the individual defendants and San Francisco Iron & Metal Company.

In paragraph IV of the first count (R. 60) the pleader alleges "that within four years next preceding the commencement of this action defendants became indebted to Goodyear Redwood Lumber Company", Berges' assignor, in a stated sum of money, etc.

These two allegations in this form are carried into the other three counts. (R. 61-64.)

Thus the several counts as originally drawn fail entirely to show the relations between the defendants

and how each defendant, *or how San Francisco Iron & Metal Company,* in particular, became liable on the indebtedness pleaded by plaintiff. This joint liability, as far as the face of the pleading is concerned, might be shown to have arisen in one or the other of several dozen or more ways.

But plaintiff was not satisfied with her pleading in this respect. So she amended her complaint to add this allegation (R. 66-67):

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, H. Silberman, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. Abraham Mercantile Company; that about October, 1927, defendant San Francisco Iron & Metal Company received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the payment of the claim and matters herein sued for, but that said defendant San Francisco Iron & Metal Company has wholly failed to do."

Here, then, we see in the pleading, for the first time, exactly how San Francisco Iron & Metal Company became liable to plaintiff. It did not become liable on the original deal, says the pleader, between the individual defendants and plaintiff's assignor, Goodyear

Redwood Lumber Company, *but it became liable because of a subsequent transaction with the individual defendants wherein it took over the properties of the individual defendants and assumed and agreed to pay such defendants' obligations, including a debt due to plaintiff's assignor.* It does *not* allege that the individual defendants and San Francisco Iron & Metal Company bore any relation whatever to each other in the creation of the original indebtedness.

Now, did the finding of the trial court follow the amendment to the complaint? No, it did not do so; and herein lies an interesting point. The finding is (R. 84-85):

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company; that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considera-

> tions specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

That is, the San Francisco Iron & Metal Company "agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and *San Francisco Iron & Metal Company,* a corporation, individually, *and as joint adventurers and co-partners doing business under the name of N. Abraham Mercantile Company*". So the San Francisco Iron & Metal Company, instead of becoming liable by a subsequent transaction as alleged became liable in the original creation of the debt to plaintiff's assignor as a joint adventurer and copartner with the individual defendants. Thus it is obvious beyond argument that the trial Court, for the purposes of the case and to determine the obligations of the defendants to the plaintiff, did go into and decide the relationships existing among the various defendants.

Another point. The original complaint alleged that H. Silberman and L. Silberman, among other individual defendants, were liable on the debt to plaintiff's assignor. (R. 59-60.) The amendment to the complaint alleged that San Francisco Iron & Metal Company had assumed the obligation of N. Abraham and H. Silberman but did not include the obligation of L. Silberman. The finding of the court, however, excludes H. Silber-

man and includes L. Silberman. Do not these things show conclusively that the court in *Berges v. Abraham* did determine the relations between the parties?

There is yet another reason why the court had to determine and did determine the relation between the defendants. Three individuals and a corporation were made defendants. Did each personally participate in the deal with plaintiff's assignor? Or, was there such a relation between the four defendants that any one of them, in making such deal, would bind the others? The complaint alleged a copartnership between the individual defendants. On that basis any partner could bind the other individual defendants. But the original complaint showed no relationship between the individual defendants and the corporate defendant but simply alleged that all defendants became indebted to plaintiff's assignor. The amendment to the complaint tied the corporation to the obligation by an alleged assumption of the liability. This would involve the question whether or not there had been, as alleged, a transaction between individual defendants and corporate defendant after the original transaction between individual defendants and plaintiff's assignor. Obviously, to put liability on San Francisco Iron & Metal Company, the trial court would have to go into this question. The court found that in the original transaction certain (but not all) of the individual defendants and the corporate defendant were joint adventurers and copartners in the original transaction; and, further, that the corporate defendant had assumed and agreed to pay the entire liability. Therefore, anyone

as representative of all, could and did bind all. That is, the court, to determine how each defendant could be bound for the debt, had to determine whether each had to be found speaking for himself or whether one could be found speaking for all. The necessity to do this made it also necessary to determine the relation between the parties.

Therefore, in view of all these things, can it be thought that, subsequently, in some action between the defendants involving the question of liability between them on the debt to Berges' assignor, any defendant could contend for anything different than the court had already found? We cannot believe it.

Let us put the question to a practical test.

We have in *Berges v. Abraham* a judgment against defendants, jointly and severally, based upon findings wherein San Francisco Iron & Metal Company, as one of the defendants, has been found to have assumed the whole liability to the plaintiff.

Suppose we assume that the plaintiff, by writ of execution, had exacted full payment of the judgment from Abraham and thereupon Abraham, claiming that the corporate defendant had assumed and agreed to pay the debt to plaintiff, had brought suit against San Francisco Iron & Metal Company to recover the full amount paid by him. Would San Francisco Iron & Metal Company be allowed in that suit to say that it had not been a copartner or joint adventurer in the original transaction or that it had not assumed the obligations of the other defendants and that, in conse-

quence, it was not liable? To make that contention it would have to repudiate the essential determinations of the trial court in the *Berges* case.

Suppose, again, that Berges by writ of execution had exacted full payment of the judgment from San Francisco Iron & Metal Company and that, after payment, this company had brought suit to recover the full amount from each of the individual defendants on the ground that the company had not been a co-partner or joint adventurer in the original transaction and had not assumed the liability of the other defendants to Berges' assignor. Would San Francisco Iron & Metal Company be allowed to open those questions again, in view of the determination of those questions against it in *Berges v. Abraham?* For us it is unbelievable that it could do so.

The discussion on this topic which has preceded is intended to lead to our further contention that the rule which appellant invokes to the effect that a judgment for a plaintiff against joint defendants is not a judgment binding upon the defendants with respect to each other in subsequent litigation does not apply *where the subsequent litigation relates to that particular judgment and is founded upon it.*

To show our meaning, let us assume that after the judgment in the *Berges* case Abraham brought a suit for an accounting against the other defendants with respect to their various business affairs. Such suit would not be founded in any way upon the judgment in the *Berges* case or relate to it or grow out of it. In

such case it may well be that the judgment in *Berges v. Abraham* would not be binding between them as a determination of the legal relations between them.

But such is not our case. Here, in effect, one of the defendants, Abraham, has paid the judgment in full and is bringing suit to recover the full amount from another defendant upon the ground that such other defendant had assumed and agreed to pay the entire obligation. We say this is so because the relation between the two surety companies depends upon the relation between the two principals. Now, after the question of assumption of liability was made an issue and decided and judgment was rendered "pursuant" thereto and Abraham was compelled to pay the full amount, can it be possible that San Francisco Iron & Metal Company can still force Abraham to relitigate that question? Petitioner has cited no authority to that effect, and we confidently assert that there is none.

Such suit of Abraham would relate to that judgment. It would rest, or rather proceed, upon the determinations made in that judgment. On the most ordinary principles of justice that judgment should be deemed conclusive between them *with respect to settlements of that judgment.*

Suppose there had been this judgment jointly and severally against Abraham and San Francisco Iron & Metal Company but no finding, and hence no judgment, of assumption of total liability by the metal company. Suppose again that Abraham had paid the judgment in full and had brought suit against the metal company

for contribution. If petitioner is correct, then the metal company would be free to defend upon the ground that, notwithstanding the judgment, the metal company had not been at all liable with Abraham to the plaintiff Berges. Could any conclusion be more absurd?

Sureties are bound by judgments which bind their principals.

Corpus Juris., Vol. 50, page 196, Sec. 336;
California Jurisprudence, Vol. 23, pages 1062-1063;
Riddle v. Baker, 13 Cal. 295;
Pico v. Wehater, 14 Cal. 202 at 204;
Irwin v. Bockus, 25 Cal. 214 at 223;
Easton v. Boston Investment Co., 51 Cal. App. 246 at 251-252.

In *Key v. Oates* (Tex.), 280 S. W. 286, the court ruled (page 288):

> "The judgment in this case recognizes that L. E. Key, Darsey, and Wilie were the makers of the note, and therefore principals, and that the other obligors were sureties. Under the evidence introduced this relationship might well have been disputed, *but as the relationship of the parties was determined in the State Bank Case, and that judgment having become final, it cannot now be questioned.* The question left for the determination of the trial court in this case is: What is the amount of the liability of each of his cosureties to Oates by reason of his payment of the judgment?"

V.

JUDGMENT IS SUPPORTED BY FINDINGS AND CONCLUSIONS.

The effect of the findings is that, as among the defendants in the *Berges* case, the San Francisco Iron and Metal Company had assumed the obligations of the other defendants to Berges' assignor. This assumption of liability made San Francisco Iron & Metal Company sole principal and the other defendants sureties for San Francisco Iron & Metal Co. on the obligation to Berges' assignor.

Cutting Packing Co. v. Packers Exchange, 86 Cal. 574 at 577;

California Jurisprudence, Vol. 18, page 57, Par. 375;

Rowley—Modern Law of Partnership—Vol. I, page 707, Sec. 558;

Corpus Juris, Vol. 50, page 26, Par. 34;

Imperial Refining Co. v. Kanotex Refining Co., 29 Fed. (2d) 193 at 199;

Atlantic & N. C. R. Co. v. Atlantic & N. C. Co. (N. C.), 23 L. R. A. (N. S.) 223 at 231;

Corvallis Etc. Co. v. Portland Etc. Co. (Oregon), 163 Pac 1173 at 1178-1179.

Since, then, Century Indemnity Co., as surety for San Francisco Iron & Metal Co., was surety for a principal and Fidelity and Casualty Co. of N. Y., as surety for Abraham, was surety for a surety, the two surety companies were not co-sureties.

Corpus Juris, Vol. 50, page 279 and note 99;

Corpus Juris, Vol. 50, page 313, Par. 529;

Corpus Juris, Vol. 50, page 278;

Arant on Suretyship, page 11;
Arnold on Suretyship & Guaranty, page 266;
Stearns on Suretyship, Sec. 263, page 477 (3rd Ed).

Therefore this is not a case for contribution between the two surety companies.

We have seen from the testimony of Silberman that San Francisco Iron & Metal Company took over all the assets of the partnership or joint adventure. We have further seen both from his testimony and from the findings in the *Berges* case that San Francisco Iron & Metal Company assumed all their obligations *and agreed to apply those assets to the satisfaction of the Berges' claim and any other obligations it had assumed.* When we look to the undertaking of Century Indemnity Co. as concerns San Francisco Iron & Metal Company we find it provides (R. 38-39):

> "* * * in consideration of the premises, and also in consideration of the release from said attachment of the property credits and effect attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, said Defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, will, on demand, redeliver the attached property credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants San Francisco Iron & Metal Company, a corpora-

> tion, H. Silverman and L. Silverman, will, on demand, pay to the plaintiff the full value of the property credits and effects released, not exceeding the amount of such judgment."

Now, therefore, is it not just, since San Francisco Iron & Metal Company assumed all obligations and had all assets of the former partnership but lost its property, credits and effects in bankruptcy and did not meet this obligation to Goodyear Redwood Lumber Company, and since petitioner's bond caused such property, credits and effects to be released from Berges' attachment and to be returned to the metal company and obligated petitioner to return such property, credits and effects to the sheriff to satisfy the judgment if the metal company did not do so, and since petitioner has not performed the obligation of its bond—is it not just, we ask, in view of all these things, that petitioner shall be compelled to meet the duty that it took upon itself by executing its bond?

The Circuit Court of Appeals said so on the first appeal. We quote:

> "If, therefore, the property seized by the sheriff was the property of the corporation *justice would require* that this property be first subjected to the payment of the judgment for which the corporation was primarily liable before the property of N. Abraham, one of the partners for which appellant is surety, or of the other partners, is applied to the judgment, although the corporation is only a co-judgment debtor upon the face of the judgment."

We do not have here merely a bond which obligates the petitioner to pay a sum of money. We have much more. We have a bond that obligates petitioner to restore to the sheriff's possession certain assets of San Francisco Iron & Metal Company which had been attached and which were properly to be devoted to payment of the Goodyear claim because the metal company had acquired all the assets of the partnership and had agreed to pay that claim. Before any attachment was levied Abraham had a right to demnd of the metal company that the attached property be devoted to payment of the claim. When the attachment was levied he still had that right. When petitioner, by its bond, enabled the metal company to get back its property Abraham still had that right; and since petitioner by its bond, had interfered with the application of that property to the payment of the claim Abraham had the right to demand of petitioner for Abraham's proper protection that petitioner either restore the property to the possession of the sheriff or pay the judgment up to the full value of the property. And since Abraham's surety had to take over the judgment his surety, represented in legal title by the plaintiff in this suit, is also entitled to compel petitioner either to restore the property or pay its value.

In *Davis v. Heimbach,* 75 Cal. 261, we have a situation which, by analogy, strongly supports our position. Heimbach gave his note to Davis and four persons went sureties for Heimbach on the note. McDaniel was one of these sureties. Later McDaniel, for certain considerations paid to him by Heimbach,

agreed himself to pay the whole debt to Davis. Davis brought this suit and took judgment against Heimbach and the four sureties. McDaniel and one of the other sureties paid the full amount. McDaniel then tried to force contribution from the two other sureties. The court denied relief because of the contract between Heimbach and McDaniel, saying:

> "that as long as it stands it is a good answer to an application for contribution whether by motion or action."

In our case the San Francisco Iron & Metal Company occupies the position of McDaniel. It likewise agreed to pay the whole debt. Therefore it couldn't come back on Abraham or either of the Silbermans for contribution in case it paid the whole judgment. But if San Francisco Iron & Metal Company would not be entitled to contribution from its co-debtors on the one side because it was obligated to pay the debt in full the converse must be true that if one of its co-debtors paid the full amount such co-debtor could recover the full amount from it.

The differences which we have here presented, with an assembly of many authorities, will be found discussed in a recent case in Alabama—*U. S. F. & G. Co. v. Yeilding Bros. etc.,* 143 So. 176 at 181-183.

A closely analogous case in principle is *Bender v. George,* 92 Pa. St. 36. The headnote accurately states the facts and decision:

> "A gave B a lease for a term of years. C and D were B's sureties. B assigned the lease to E, who assigned it to F, for whom H became security

as bail absolute for payment of the rent and performance of the covenants of the lease. F defaulted for the rent and D was compelled to pay the same to A. He then brought an action in the name of A, for the use of D, against H. Held, reversing the court below, that he could recover."

At page 39 the court said:

"Where two persons are equally liable to the creditor, if as between themselves, there is a superior obligation resting on one to pay the debt, the other, after paying it, may use the creditor's security to obtain reimbursement."

The form of action, we wish the court to note, was "debt"—a common law action.

The fact is that in law the bond of Century Indemnity Company took the place of the released assets that San Francisco Iron & Metal Company should have devoted to pay its obligation and to protect Abraham against loss.

Harding v. Minear, 54 Cal. 502 at 507.

Abraham as surety, upon satisfying the San Francisco Iron & Metal Company's obligation as principal to the Goodyear Redwood Lumber Co. (Berges), would be entitled to enforce the remedies of Berges against the San Francisco Iron & Metal Co., namely, the judgment and the security for the judgment (the substitute for the released assets) existing in the bond on release of assets from attachment; for our Civil Code Section 2848 says:

"A surety, upon satisfying the obligation of the principal is entitled to enforce every remedy

> which the creditor then has against the principal to the extent of reimbursing what he has expended."

Abraham and Century Indemnity Co. were not sureties on an equal footing. As between Abraham and San Francisco Iron & Metal Co., the latter was bound for the full amount and had a duty to save Abraham harmless. Since Century Indemnity Co. went surety for San Francisco Iron & Metal Company it too, in relation to Abraham, was in duty bound to satisfy the company's obligation for the protection of Abraham, particularly as its bond enabled that company to recover its assets from attachment and subsequently to dissipate them and so to cause them to be unavailable for satisfaction of the judgment and the protection of Abraham. Those assets should have been there to protect Abraham to the full when the adverse judgment in Berges' favor became enforcible by writ of attachment. As they were not available and Century Indemnity Company had agreed by its bond to make them available and as they should have been available for Abraham's complete protection, the Century Indemnity Company would be liable to Abraham if he had satisfied the judgment, just as the Civil Code section says. Abraham would be entitled to exercise Berges' rights.

Because of his preferred position over Centutry Indemnity Co. Abraham as surety was virtually as supplemental surety for Century Indemnity Co. as surety; that is, Abraham was surety for a surety. As

such he could recover in full from Century Indemnity Co.

50 *Corpus Juris,* page 314, Sec. 531, Article—Principal and Surety.

Abraham also had a surety, the Fidelity & Casualty Company of N. Y. It paid Berges and took an assignment of the judgment. Abraham then became liable to it for reimbursement. If Abraham fulfilled that obligation he, in effect, would satisfy the judgment and so could go, as shown above, against the Century Indemnity Company on its bond. As, *first,* Abraham was in duty bound to reimburse the Fidelity & Casualty Company and that duty had matured, and as, *second,* the San Francisco Iron & Metal Co. and its surety, Century Indemnity Company, had the duty of satisfying the obligation to Berges for the protection of Abraham by production of the assets released from the attachment or by payment of their monetary value as stipulated but had not done so and this duty had also matured, and as, *third,* Abraham's surety, Fidelity & Casualty Company, had had to pay what the Century Indemnity Co. should have paid for the benefit and protection of Abraham and his surety, the Century Indemnity Company was bound to respond to the claim of the Fidelity & Casualty Company of New York, as demand is here made that it do. Circuity of action is thereby avoided, namely, suit by Fidelity & Casualty Company of New York against Abraham and subsequent suit by Abraham against Century Indemnity Company. The end is inevitable that Century Indemnity Company must pay.

In fact, our position is supported by the next section (2849) of the Civil Code, which says that:

> "a surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor."

Berges here held as security the bond in release of attachment issued by the Century Indemnity Company for the benefit of San Francisco Iron & Metal Co. That company was obligated to save Abraham harmless and the Century Indemnity Co. by its bond was obligated to return the released assets or their equivalent in money as stipulated so that Abraham would be saved harmless. Therefore full satisfaction should be made, on equitable principles, out of San Francisco Iron & Metal Co. and its surety and nothing should be exacted from Abraham and his surety. So the Fidelity & Casualty as Abraham's surety, became entitled to the security held by Berges through San Francisco Iron & Metal Company, just as the Circuit Court of Appeals decided on the first appeal.

Dated, San Francisco, California,
January 21, 1938.

Respectfully submitted,
JOE G. SWEET,
Counsel for Respondent.

HADSELL, SWEET, INGALLS & LAMB,
D. HADSELL,
Of Counsel.

P. 1

SUPREME COURT OF THE UNITED STATES.

No. 362.—October Term, 1937.

The Century Indemnity Company, Petitioner,
vs.
G. Nelson.

Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 28, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

This cause went up by appeal from the District Court, Northern District, California. Of the twenty-eight assignments of error, eleven, based upon the trial court's refusal of certain requested special findings, were rejected by the Circuit Court of Appeals. It held the requests "were made too late", that "the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial." To support this view it cited *Continental National Bank* v. *National City Bank*, (9th Cir.) 69 Fed. (2d) 312, 317, which affirms—"It is settled that they [assignments of error] came too late if made after judgment even though the trial judge, after judgment, granted leave to make the request."

requests for findings

A jury having been duly waived, the trial judge heard evidence. At the conclusion of this counsel for both sides made motions for judgment and findings. The minutes of May 31, 1934, show—"This case having been heretofore heard and submitted and due consideration having been had, it is ordered that judgment be entered for plaintiff, with interest and costs, upon findings of facts and conclusions of law to be presented."

The bill of exceptions recites—"Thereafter [after requests for judgment and findings] the case was orally argued before the court and was submitted upon written briefs. Thereafter and on June 1, 1934, [May 31?] and outside the presence of the parties, the Court made and entered its order granting judgment to the plaintiff with findings to be submitted. Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant

served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff. Thereafter and on June 16, 1934, the Court, without the presence of the parties, signed the proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the Court, and judgment was entered on said June 16, 1934."

June 16, 1934, "Special Findings and Conclusions of Law" presented for plaintiff Nelson were signed by the District Court and were filed. The document concluded thus—

"From the foregoing Findings of Fact the court concludes that judgment should be entered in favor of the plaintiff and against the defendant in the sum of Six Thousand ($6000.00) Dollars together with interest thereon at the legal rate of seven (7%) per annum from the date of the commencement of this action, to-wit: September 24, 1931, together with plaintiff's costs of suit incurred herein, and that upon satisfaction of said Judgment the Clerk of this court should deliver to the defendant the assignment by plaintiff against the San Francisco Iron & Metal Company, a corporation in bankruptcy.

"Let judgment be entered accordingly."

Sec. 875, Title 28, U. S. C. A., is in the margin;[1] also Rule 42, District Court Northern District of California.[2]

We are unable to accept the conclusion below that within the intent of the statute the "progress of the trial" ended on June 1,

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[1] Section 875, Title 28, U. S. C. A.

Review in cases tried without jury. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

[2] Rule 42, United States District Court, Northern District of California.

Findings. . . . In actions at law, where a request for special findings of fact is made and granted, and in suits in equity, no judgment shall be entered until the findings and, in an equity suit, the conclusions of law, shall have been signed and filed or waived as hereinafter provided; but the rendition of the decision or opinion shall be deemed and considered; and shall be entered by the Clerk, as merely a preliminary order for judgment. Within five days after written notice of the decision, the prevailing party shall prepare a draft of the finding and, in an equity suit, of the conclusions of law, and deliver the same to the Clerk for the Judge and serve a copy thereof upon the adverse party, who may, within five days thereafter, deliver to the Clerk and serve upon the adverse party such proposed amendments or additions as he may desire.

If the prevailing party fails to present such draft as above provided, the adverse party may prepare a draft thereof and deliver the same to the Clerk

when the court ordered "that judgment be entered for plaintiff, with interest and costs, upon findings of fact and conclusions of law to be presented", and thereafter it was too late adequately to present special findings of fact. The qualifying words in the order "upon findings of fact and conclusions of law to be presented" are appropriate to suggest "merely a preliminary order" and reservation of opportunity for further action. Considering them along with Rule 42 and the subsequent action by counsel for both sides and the court—all without suggestion of objection—it appears plain enough that all parties understood the cause was "in progress of trial" until entry of the final judgment on June 16. Rule 42 is susceptible of the interpretation insisted upon by counsel for petitioner and apparently they proceeded in good faith according to that view. In so doing, we think they were right. See *Clement* v. *Phoenix Ins. Co.*, Fed. Cases 2,882.

Continental National Bank v. *National City Bank* does not discuss Rule 42 and went upon facts which seem materially different from those presented by this record.

Refusal to consider the eleven assignments of error arose from what we regard as wrongful interpretation and application of Sec. 875 and Rule 42. Their evident purpose is to insure orderly and timely presentation to the judge of matters deemed important in advance of any definite action by him in respect of them. They should not be so narrowly construed as to defeat their real purpose.

It is not necessary in the circumstances to treat the first order for judgment (June 1) as ending "the progress of the trial." All counsel and the presiding judge seem, rightly we think, to have entertained a wholly different view and to have acted accordingly.

The challenged judgment must be reversed. The cause will be remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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for the Judge and serve a copy thereof on the prevailing party within five days thereafter.

The findings of fact and, where required, the conclusions of law, shall thereafter be settled by the Judge, and when so settled shall be engrossed within five days thereafter, and shall be then signed and filed. A failure to comply with the requirements of this rule may be deemed to be a waiver of findings by the party so failing.